CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 287.

FERDINAND EIDMAN, U. S. COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

MIGUEL R. MARTINEZ, AS ANCILLARY ADMINISTRATOR WITH THE WILL ANNEXED OF SALVADOR ELIZALDE, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED APRIL 8, 1901.
(18100.)

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INDEX.

	Original.	Print.
Certificate from United States circuit court of appeals for the second circuit	1	1
Statement of facts	1	1
Questions certified	3	2
Judge's certificate	4	2
Clerk's certificate	5	2

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1 United States circuit court of appeals for the second circuit.

FERDINAND EIDMAN, UNITED STATES collector of internal revenue for the third district of New York, plaintiff in error, *against* MIGUEL R. MARTINEZ, AS ANCILLARY administrator with the will annexed of Salvador Elizalade, deceased, defendant in error.	Error to the circuit court of the United States for the southern district of New York.

This cause coming on for final hearing before this court, certain questions of law arose, concerning which this court desires the instructions of the Supreme Court of the United States for its proper decision.

The facts out of which the questions arose are as follows:

Salvador Elizalde, a nonresident alien, a subject of the King of Spain who had never resided within the United States, died in Paris, France, on April 27th, 1899, leaving a will in the Spanish language, executed in Paris, in the year 1891, pursuant to the laws of Spain. This will was filed and protocolized in the office of the Spanish consul in Paris, and thereby under the laws of Spain and the consular convention or treaty between Spain and France, Arturo Elizalde, the sole legatee under said will, became entitled to the possession and administration of all the personal property of the decedent. Said Arturo Elizalde is the

2 only son and sole next of kin of the decedent, and is a non-resident alien and a Spanish subject. He has resided all his life in Spain and France, and has never resided in the United States. Said will purports to give all of the personal property of the decedent to his said son, but, by the laws of Spain, only one-third of the property passed by the will, and the remaining two-thirds passed to said son by and under the Spanish intestate law.

The decedent left certain federal, municipal, and corporate bonds, of the par value of $225,400, in the custody of his agents in the city of New York, and they were within the third collection district of New York at the date of his death.

After the filing of said will in Paris, Arturo Elizalde entered upon the administration of the decedent's personal estate, and appointed the defendant in error, Miguel R. Martinez, his attorney for the purpose of receiving ancillary letters of administration with the will annexed in the State of New York, and such letters were issued to him by the surrogate of New York County. After receiving such letters, said Martinez took possession of said bonds.

The United States Commissioner of Internal Revenue, under the alleged authority of the 29th and 30th sections of the act of Congress of June 13th, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," assessed an internal-revenue tax of $4,293.76 upon a legacy and distributive share arising from personal property in the hands of the administrator, defendant in error, who paid said tax to the United States collector of internal revenue for the third district of New York, plaintiff in error, under protest and upon compulsion of the collector's threat of distraint and sale, and made

the statutory application for its refund to the Commissioner of
3 Internal Revenue, who rejected the application. The administrator then brought this action in the circuit court of the United States for the southern district of New York against the collector to recover the amount of the tax.

The collector demurred; the demurrer was overruled, and a final judgment entered against the collector for the amount claimed, with interest and costs. The collector then brought the action into this court on writ of error.

The said questions of law which arose out of the foregoing facts are as follows:

1. Is any tax or duty imposed by the 29th and 30th sections of the act of Congress of June 13th, 1896, entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon the passing of any legacy arising out of the personal property of a non-resident alien who has never resided or had a domicile within the United States, and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicile, pursuant to the laws thereof, by which he gives all his property to a nonresident alien legatee, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

2. Is any tax or duty imposed by the 29th and 30th sections of the act of Congress of June 13th, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon the passing of any distributive share arising out of the personal property of a nonresident alien who has never resided or had a domicile within the United States, and who dies without the United States, in the year 1899, intestate, and by the law of his foreign domicile all of his personal property passes to his son, also a nonresident alien, and who leaves certain
4 personal property within the State of New York, exceeding $10,000 in value?

In accordance with the provisions of section 6 of the act of Congress of March 3, 1891, entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," the foregoing questions of law are by the circuit court of appeals for the second circuit certified to the Supreme Court of the United States; and

It is ordered that the clerk transmit the foregoing certificate under the seal of this court to the clerk of the Supreme Court of the United States at the city of Washington.

Dated March 25th, 1901.

WM. J. WALLACE,
E. HENRY LACOMBE,
N. SHIPMAN,
Judges of the United States Circuit Court of Appeals for the Second Circuit.

5 UNITED STATES OF AMERICA,
Second Circuit, ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in

the cause entitled Ferdinand Eidman, United States collector, etc., against Miguel R. Martinez, as ancillary administrator, etc., was duly filed and entered of record in my office by order of said court on the 29th day of March, 1901, and, as directed by said court, the said certificate has been by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this 29th day of March, in the year of our Lord one thousand nine hundred and one.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals
for the Second Circuit.

6 Indorsed: United States circuit court of appeals, second circuit. Ferdinand Eidman *v.* Miguel R. Martinez. Certificate. United States circuit court of appeals, second circuit. Filed Mar. 29, 1901. William Parker, clerk.

(Indorsement on cover:) Office Supreme Court U. S. Received Mar. 30,1901. (Certificate.) File No. 18,100. U. S. C. C. of Appeals, 2nd circuit. Term No. 645,287. Ferdinand Eidman, U. S. collector of internal revenue for the 3rd district of New York, plaintiff in error, vs. Miguel R. Martinez, as ancillary administrator with the will annexed of Salvador Elizalde, deceased. Filed April 3rd, 1901.

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28944

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

FERDINAND EIDMAN, COLLECTOR, ETC., plaintiff in error,
against
MIGUEL R. MARTINEZ, AS ANCILLARY administrator, etc., defendant in error.

No. 615.

MOTION TO ADVANCE.

This case is before the court on questions certified by the United States circuit court of appeals for the second circuit.

And now comes the plaintiff in error by the Solicitor-General and moves the court to advance the cause on the docket and assign the same for argument during the next term of the court in October, 1901.

This action was brought by the defendant in error in the circuit court of the United States for the southern district of New York to recover the amount paid by him to the collector under protest as a tax upon legacies and distributive shares assessed under the twenty-ninth and thirtieth sections of the war-revenue law of June 13, 1898. The collector demurred, the demurrer was overruled, and a final judgment entered against the collector for the amount claimed, with interest and

costs. The collector thereupon sued out a writ of error in the United States circuit court of appeals for the second circuit. The cause came on for argument before that court, and the judges thereupon certified the following questions of law to this court:

1. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," upon the passing of any legacy arising out of the personal property of a nonresident alien who has never resided or had a domicile within the United States and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicile, pursuant to the laws thereof, by which he gives all his property to a nonresident alien legatee, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

2. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," upon the passing of any distributive share arising out of the personal property of a nonresident alien who has never resided or had a domicile within the United States and who dies without the United States in the year 1899 intestate, and by the law of his foreign domicile all of his personal property passes to his son, also a nonresident alien, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

This case is one which involves a matter of general public interest. The liability of a large number of other estates of nonresident alien decedents to the payment of this tax depends upon the answer to be given to these questions, and, until the decision of this court thereon, said estates can not be settled and distributed. A large amount of revenue to which the Government believes that it is entitled is meantime withheld under the decision of the circuit court.

It is for the reasons aforesaid, respectfully submitted, that this case may properly be advanced for hearing early in the next term.

JOHN K. RICHARDS,
Solicitor-General.

I concur in the above application.

J. G. CARLISLE,
For Defendant in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FRANK R. MOORE, AS UNITED STATES collector of internal revenue, first district, State of New York, plaintiff in error, v. MAX RUCKGABER, SR., AS SOLE EXECUTOR of the last will and testament of Louisa Augusta Ripley-Pinede, deceased.	No. 295.
FERDINAND EIDMAN, UNITED STATES collector of internal revenue for the third district of New York, plaintiff in error, v. MIGUEL R. MARTINEZ, AS ANCILLARY administrator with the will annexed of Salvador Elizalde, deceased.	No. 287.

BRIEF FOR THE UNITED STATES.

STATEMENT.

CASE NO. 295.

The original action was brought by the defendant in error, as sole executor of the last will and testament of Louisa Augusta Ripley-Pinede, against the collector of internal revenue of the first district of New York, to recover back the Federal legacy tax collected under

the war-revenue act of June 13, 1898 (30 Stat., 464). A demurrer to the complaint was overruled, judgment taken, and the case carried on error to the circuit court of appeals, which certified to this court two questions of law arising out of the facts stated in the record.

It appears that on September 25, 1898, Louisa Augusta Ripley-Pinede died at Zurich, Switzerland, leaving a considerable personal estate located in New York and a will executed in New York. At the time of her death the testatrix was a nonresident of the United States, "being then, and having been for at least eight years immediately preceding that time, domiciled in and a permanent resident of the Republic of France."

The will of the testatrix was dated November 6, 1890, and was executed in the city of New York, where the testatrix was at that time sojourning. By this will she bequeathed "all the personal property of every kind *in the United States of America* which may belong to me at the time of my death" to her daughter, Carmela von Groll, wife of Lieut. Max von Groll, then residing at Ulm, in Wurtemberg, Germany, and she appointed as executors her daughter, Carmela von Groll, Whitelaw Reid, of New York, Charles Allen, of Boston, and Max Ruckgaber, sr., of Brooklyn.

On February 17, 1899, this will was duly admitted to probate by the surrogate's court of Kings County, N. Y., and on this day the daughter, Whitelaw Reid, and Charles Allen having renounced their appointments as executors, and Max Ruckgaber, sr., having

duly qualified, letters testamentary were issued to him *as sole executor.*

The personal property of the testatrix, located in the United States at the time of her death, as valued by the appraisers appointed by the court, was as follows:

Bonds and coupons of divers American corporations	$90,134.27
One share of stock of the Tribune Association, a New York corporation	7,500.00
An indebtedness from the firm of Schulz & Ruckgaber, of New York City	8,036.43
Total	105,670.70

The amount of the debts of the testatrix, the executor's commissions, and general expenses of administration, amounted to $2,246.70, leaving a balance passing to the sole legatee under the will of $103,424.

Upon this the Federal legacy tax assessed and charged amounted to $1,551.36, to recover back which the original suit was brought.

The questions of law certified to this court are as follows:

> (1) Can the said personal property of the nonresident testatrix, Louisa Augusta Ripley-Pinede, actually located within the United States at the time of her death, September 25, 1898, be deemed to have a situs in the United States for the purpose of levying a tax or duty upon the transmission or receipt thereof under sections 29, 30, and 31 of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898?
>
> (2) Was the transmission or receipt of the

said personal property of the nonresident testatrix, Louisa Augusta Ripley-Pinede, which was actually located in the United States at the time of her death, September 25, 1898, subject to taxation under sections 29, 30, and 31 of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898?

CASE NO. 287.

The original action was brought by the defendant in error, as ancillary administrator with the will annexed of Salvador Elizalde, deceased, against the collector of internal revenue for the third district of New York, to recover back the Federal legacy tax collected under the war-revenue act of June 13, 1898 (30 Stat., 464). A demurrer by the Government to the complaint was overruled, judgment taken, and the case carried on error to the circuit court of appeals, which certified to this court two questions of law arising out of the facts stated in the record.

It appears that on April 27, 1899, Salvador Elizalde, a nonresident alien, a subject (Cuban) of the King of Spain, who had never resided within the United States, died in Paris, France, leaving a large personal estate in the hands of his agents in New York and a will in the Spanish language, executed in Paris in 1891, pursuant to the laws of Spain. The personal estate left by the decedent was in charge of P. Harmony's Nephews & Co., 35 South William street, New York City, and consisted of the following Federal, municipal, and corporate securities, as inventoried under the administration hereinafter referred to:

Par value.	Description of securities.	Form.	Redeemable.	Rate of interest.	April 27, 1899, price.	Amount.
				Per cent.		
$54,400	United States 4 per cent bonds of 1907	Registered	After July, 1907	4	112½	$61,200
2,000	New York City "Croton Water Main Stock"	do	Nov. 1, 1900	7	105½	2,105
5,000	New York City "Additional New Croton Aqueduct."	do	Aug. 1, 1900	6	102½	5,125
22,000	Brooklyn "Permanent Water Loan"	do	July 1, 1899	6	100	22,000
1,000	do	do	Jan. 1, 1902	6	107½	1,075
2,000	Brooklyn "Public Parks"	do	July 1, 1924	6	147½	2,950
17,000	Illinois Central (Mid. Div.) 5 per cent bonds	do	Aug. 1, 1921	5	117	19,890
30,000	New York, Lackawanna and Western, first mortgage 6 per cent bonds of 1921.	do	Jan. 1, 1921	6	134	40,200
10,000	Harlem River and Port Chester first mortgage 6 per cent bonds.	do	Oct. 1, 1903	6	111	11,100
25,000	New York Central and Hudson River Railroad first mortgage bonds.	do	Jan. 1, 1903	7	114½	28,625
11,000	New York and Harlem Railroad Company first mortgage 7 per cent bonds.	do	May 1, 1900	7	107	11,770
26,000	Morris and Essex Railroad Construction mortgage 7 per cent bonds.	do	Oct. 1, 1901	7	108½	28,210
25,000	Albany and Susquehanna Railroad first consolidated mortgage bonds.	do	Apr. 1, 1906	6	115	28,750
25,000	Utica, Clinton and Binghamton Railroad first mortgage 5 per cent bonds.	Bearer	July 1, 1939	5	121	30,250
255,400						293,250

2882

Salvador Elizalde left an only son, Arturo Elizalde, born in Cuba, who is a nonresident alien and a Spanish subject.

The will was filed and protocolized in the office of the Spanish consul in Paris, and thereby under the laws of Spain and the consular convention or treaty between Spain and France, Arturo Elizalde, the sole legatee under the will, became entitled to the possession and administration of all the personal property of the decedent. The will proposed to give all the personal property of the decedent to said Arturo, but, by the laws of Spain, only one-third of the property passed by the will and the remaining two-thirds passed to the son by and under the Spanish intestate law.

After the filing of the will in Paris, Arturo Elizalde, the sole heir and legatee, entered upon the administration of the decedent's personal estate, and appointed the defendant in error, Miguel R. Martinez, his attorney, for the purpose of receiving ancillary letters of administration, with the will annexed, in the State of New York, and such letters were issued to him by the surrogate of New York County. After receiving such letters, Martinez took possession of the securities. Upon the transmission of the legacy and distributive share to Arturo Elizalde, a Federal legacy tax, amounting to $4,293.76, was assessed and paid under protest. To recover this back the original suit was brought.

The questions of law certified are as follows:

> 1. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act

of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon the passing of any legacy arising out of the personal property of a nonresident alien who has never resided or had a domicile within the United States, and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicile, pursuant to the laws thereof, by which he gives all his property to a nonresident alien legatee, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

2. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon the passing of any distributive share arising out of the personal property of a nonresident alien who has never resided or had a domicile within the United States, and who dies without the United States, in the year 1899, intestate, and by the law of his foreign domicile all of his personal property passes to his son, also a nonresident alien, and who leaves certain personal property within the State of New York exceeding $10,000 in value.

ARGUMENT.

I.

In case No. 295, the court will observe:

First. That the will was made in New York, according to the laws of that State;

Second. That it bequeathed only personal property within the United States;

Third. That the will was probated in New York, letters testamentary issued there, and the administration of the estate conducted entirely under the laws of New York and by a sole executor residing there; and,

Fourth. That the only property which passed under the will was property located in New York.

Such being the circumstances, will, property, and executor all subject to and regulated by the laws of New York, the sole circumstance relied on to exempt this legacy from Federal taxation is that the testatrix at the time of her death was a nonresident of the United States, being at that time and for eight years preceding "domiciled in and a permanent resident of the Republic of France." At the same time it is to be noted that she did not die in France, but at Zurich, in Switzerland. Her residence in France at the time of her death was an alleged legal status. The situation would have been the same if she had died in New York, where her will had been made and her property was located, provided she still claimed to be a nonresident of the United States and *domiciled* in France.

II.

The exemption from the Federal legacy tax claimed for the transmission or receipt of the personal estate located in the United States of a non-resident decedent, is largely based upon the application, in the construction of sections 29 and 30 of the war-revenue act of

June 13, 1898, of the ancient maxim *mobilia sequuntur personam*. It is evidently to this that the circuit court of appeals refers in propounding the primary question submitted in No. 295, namely:

> Can the said personal property of the non-resident testatrix, Louisa Augusta Ripley-Pinedo, actually located within the United States at the time of her death, September 25, 1898, *be deemed to have a situs in the United States* for the purpose of levying a tax or duty upon the transmission or receipt thereof under sections 29, 30, and 31 of the act, etc., approved June 13, 1898?

With respect to the limited operation of this maxim at present, under modern conditions, I can not do better than to quote the language of this court, speaking by Mr. Justice Gray, in the case of *Pullman Palace Car Company* v. *Penna.* (141 U. S., 18, 22):

> No general principles of law are better settled or more fundamental than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since

the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*—the law of the place where the property is kept and used. (*Green* v. *Van Buskirk*, 5 Wall., 307, and 7 Wall., 139; *Harvey* v. *Rhode Island Locomotive Works*, 93 U. S., 664; *Harkness* v. *Russell*, 118 U. S., 663, 679; *Walworth* v. *Harris*, 129 U. S., 355; Story on Conflict of Laws, sec. 550; Wharton on Conflict of Laws, secs. 297–311.) As observed by Mr. Justice Story in his commentaries just cited, "although movables are for many purposes to be deemed to have no *situs* except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner, and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax. (*Lane County* v. *Oregon*, 7 Wall., 71, 77; *Railroad Co.* v. *Pennsylvania*, 15 Wall., 300, 323, 324, 328; *Railroad Co.* v. *Peniston*, 18 Wall., 5, 29; *Tappan* v. *Merchants' Bank*, 19 Wall., 490, 499;

State Railroad Tax Cases, 92 U. S., 575, 607, 608; *Brown* v. *Houston*, 114 U. S., 622; *Coe* v. *Errol*, 116 U. S., 517, 524; *Marye* v. *Baltimore and Ohio Railroad*, 127, U. S., 117, 123.)

In the case of *Adams Express Co.* v. *Ohio* (166 U. S., 185), in which was involved the situs for taxation of the intangible property of an express company, Mr Justice Brewer, speaking for the court, in denying the petition for a rehearing, said (p. 224):

> It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was "*mobilia personam sequuntur*," but that maxim was never of universal application, and seldom interfered with the right of taxation. (*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S., 18, 22.) It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 of intangible property for purposes of taxation was changed from the State of New York to that of New Jersey.

Again, page 225:

> In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many States, to escape from bearing in each State such

burden of taxation as a fair distribution of the actual value of their property among those States requires.

In the recent case of *Bristol* v. *Washington County* (177 U. S., 133), in which the court held that the personal property of a citizen of and resident in one State, invested in bonds and mortgages in another State, is subject to taxation in the latter State, the court, speaking by Mr. Chief Justice Fuller, quotes the following language from the opinion below (pp. 141, 142):

> "For many purposes the domicil of the owner is deemed the *situs* of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual *situs* of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. Thus, corporeal personal property is conceded to be taxable at the place where it is actually situated. A credit, which can not be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its *situs* where it is owned—at the domicil of the creditor. The creditor, however, may give it a business *situs* elsewhere; as where he places it in the hands of an agent for collection or renewal, with a view to reloaning the money and keeping it invested as a permanent business." After citing *Catlin* v. *Hall*, 21 Vermont, 152; *People* v. *Smith*, 88 N. Y., 576; *Wilcox* v. *Ellis*, 14 Kansas, 588; *Board of Supervisors* v. *Davenport*, 40 Illinois, 197, and many other cases, the

opinion continued thus: "The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government. Now, here was property within this State, not for a mere temporary purpose, but as permanently as though the owner resided there. It was employed here as a business by one who exercised over it the same control and management as over his own property, except that he did it in the name of an absent principal. It was exclusively under the protection of the laws of this State. It had to rely on those laws for the force and validity of the contracts on the loans, and the preservation and enforcement of the securities. The laws of New York never operated on it. If credits can ever have an actual *situs* other than the domicil of the owner, can ever be regarded as property within any other State, and as under obligation to contribute to its support in consideration of being under its protection, it must be so in this case."

III.

The cases to which I have referred involved the direct taxation of personal property where located, although the owner was domiciled in another State, but the same disregard of the old maxim referred to obtains in the levying of inheritance taxes by the various States of the Union. It is unnecessary for me to refer to the provisions of the inheritance tax laws of the several States. They will be found in the appendix to Dos Passos on Inheritance Tax Law, second edition. I

know of no State levying a legacy tax which does not impose the tax upon the personal property of a nonresident decedent which is located in the State. Respecting the liability of such property or its transmission to taxation, Dos Passos says (p. 167, sec. 47):

> In some States this result has been reached either by a construction placed upon the statutes on ground of public policy, favoring equality, and to prevent unjust discrimination between estates of resident and nonresident decedents, and in others by express legislation, and the tax has been imposed upon both the real and personal property, tangible and intangible, of nonresident or alien decedents actually within the taxing State at the time of death, whether or not there be legatees or heirs within the State. In such cases the theory seems to be that for the purposes of this tax the succession is deemed to take place under the law of the taxing State, in reaching which result the courts have leaned toward the actual or real *situs* of property, having a visible and tangible existence, rather than to the mere domicile of the owner (referring to cases).

In the State of New York it was held that the collateral inheritance-tax act of 1885 did not apply to the property of a nonresident decedent located within the State, but this was because of the peculiar language of the act, the phraseology of which, as the court said, was "singularly involved and obscure." (See *Matter of Euston*, 118 N. Y., 174, 177.) The act as originally passed provided that "all property which shall pass by

will or by the intestate laws of the State, from any person who may die seized or possessed of the same *while being a resident of the State*, etc.," and a divided court held, in the case which I have just cited, that this language restricted the tax to property passing from a decedent who was a resident of the State.

In 1887 the act was amended so as to provide that all property "which shall pass by will or the intestate laws of this State, from any person who may die seized or possessed of the same while a resident of this State, *or if such decedent was not a resident of this State at the time of death, which property, or any part thereof, shall be within this State*," *and* the court of appeals of New York held, in the *Matter of the Estate of Romaine* (127 N. Y., 80), that the personal property of a nonresident intestate, which was located in New York, was liable to taxation under the act. I quote from the opinion of the court, bottom page 86:

> That the legislature had the power to do this can hardly be questioned. (*Matter of McPherson*, 104 N. Y., 306.) As was said by Judge Story, when writing upon this subject: "A nation within whose territory any personal property is actually situated has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there." (Conflict of Laws, sec. 550.) In *People ex rel. Hoyt* v. *Commissioners of Taxes* (23 N. Y., 224, 228), Judge Comstock quotes with approval the foregoing extract, and adds: "I can think of no more just and appropriate exercise of the sovereignty of a

> State or nation over property situated within it and protected by its laws than to compel it to contribute toward the maintenance of government and law. Accordingly there seems to be no place for the fiction of which we are speaking (*mobilia personam sequuntur*) in a well-adjusted system of taxation." (See, also, *Guillander* v. *Howell*, 35 N. Y., 657; *Graham* v. *First National Bank of Norfolk*, 84 id., 393, 401; *Catlin* v. *Hull*, 21 Vt., 152; Dos Passos on Collateral Inheritance, 37, 92.)

The court in its opinion also cites *State* v. *Dalrymple*, 70 Md., 294; *Alvany* v. *Powell* 2 Jones Eq. (N. C.), 51.

IV.

I concede that in the case of *Thompson* v. *Advocate-General* (12 Clark & F., 1—decided in 1845) it was held that the English legacy act did not apply to property within Great Britain of a nonresident decedent; but I am safe in saying that the States of the Union have declined to follow the English rule that personal property has no *situs* of its own and therefore follows the domicil of its owner, but on the contrary have taken the sensible view that personal property within a State of a person living abroad, which receives the benefit not only of the protection of its laws, but of the prosperity of its people, ought, on its transmission after death, to bear the same burden and pay the same tax that would be imposed if it belonged to a resident.

It is contended on the other side that, since we got the idea of our legacy tax law from England, we must

in its construction and application follow the English authority to which I have alluded; but I submit that the war-revenue act of 1898 was passed after the enactment by many of the States of the Union of inheritance tax laws, all of which were made applicable to the personal property within the State of nonresident as well as resident decedents. These laws are referred to in the opinion of this court in *Magoon* v. *Illinois* (170 U. S., 283), decided before the war-revenue act of 1898 was passed. The principles upon which these laws were based are stated by this court, speaking by Mr. Justice McKenna, as follows (p. 288):

> (1) An inheritance tax is not one on property, but one on the succession.
>
> (2) The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege—and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation.

If in taking the personal property within a State of a nonresident decedent a right or privilege is enjoyed which the State may tax by annexing a condition, why is there not such a transmission or passage of that property as to bring it within the operation of the Federal legacy tax?

In the case of *United States* v. *Perkins* (163 U. S., 625), it was held that property bequeathed to the

United States could be lawfully included in the New York inheritance tax. In the opinion, delivered by Mr. Justice Brown, it was said (p. 628):

> That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other States.

Yet, again (p. 630):

> We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it.

In the case of *Knowlton* v. *Moore* (178 U. S., 41), Mr. Justice White, speaking for the court, said:

> The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate.

In the case of *Plummer* v. *Coler* (178 U. S., 115), all the authorities, State and Federal, bearing upon the nature of inheritance-tax laws are reviewed for the purpose of determining whether the portion of an estate in New York invested in United States bonds was taxable under the inheritance-tax law of that State, and this court, speaking by Mr. Justice Shiras, reached the following conclusion (p. 134):

> We think the conclusion fairly to be drawn from the State and Federal cases is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing the tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing, and that the incidental fact that such property is composed, in whole or in part, of Federal securities does not invalidate the tax or the law under which it is imposed.

V.

Such being the law of the States, personal property being taxed where located, irrespective of the domicile of its owner, and the inheritance-tax laws of the States being applied to the property within the States of non-resident as well as resident decedents, upon the theory that in the transmission or receipt of such property a privilege is enjoyed under the law of the State, I submit that it was the intention of Congress, in enacting the Federal legacy tax law of 1898, to reach and tax the passage of personal property occasioned by death in every case where such transmission is made taxable by a State law, save where the Federal law itself makes specific exemptions. If there was a transmission or receipt of property within a State as the result of death, so that the State could tax the privilege enjoyed in such transmission or receipt, then there was a passage of the property within the United States ample to warrant the Federal exaction. I think it clear that Congress acted upon this conviction and with the intention of reaching every transmission or

passage of personal property within the United States, whether by will or in case of intestacy, or as a gift *inter vivos* to take effect upon death. An examination of the language of the act, with the amendments which have been made since its passage, will confirm this conclusion.

Section 29 provides:

> That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property * * * passing, after the passage of this act, from any person possessed of such property, either by will or the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, etc., shall be, and hereby are, made subject to a duty or tax to be paid to the United States, as follows, etc.

It is to be observed that it is not the personal property referred to which is made subject to the tax, but the administrator, executor, or trustee who has the property in charge or trust.

Every person is made subject to the tax who has in charge or trust, whether as administrator, executor, or trustee—

Any legacy or distributive share arising from personal property passing—

(*a*) Either by will, or

(*b*) By the intestate laws of any State or Territory; or,

Any personal property or interest therein transferred by deed, grant, bargain, sale, or gift, made or intended to take effect after the death of the grantor.

The statute does not provide that the legacy must pass from any person *residing in the United States* possessed of such property, etc. It applies to all legacies, distributive shares, or gifts to take effect after death, which are held in charge by administrators, executors, or trustees within the United States. The law is framed so as to reach every case of the passage of personal property within the United States from the dead to the living, whether by will, or as a result of intestacy, or by gift to take effect after death.

That Congress intended by the language in section 29 to reach every personal estate within the United States, whether of a resident or a nonresident decedent, is shown conclusively by the amendments made to section 30 by the act of March 2, 1901 (31 Stat., 948).

As pointed out in *Knowlton* v. *Moore* (178 U. S., 41, 69), Congress had before it in enacting the present law, not the act of 1864 as amended by the act of 1866, but the original act of 1864. The original act of 1864 contained in section 125 (now section 30) a method for the collection of the tax, and provided that every executor, administrator, or trustee, before payment and distribution, should pay to the collector or deputy collector "of the district of which the deceased person was a resident" the amount of the duty or tax assessed. In the *Hunnewell case* (13 Fed. Rep., 617) this provision was referred to in support of the conclusion that the act of 1864 was only intended to

reach the estates of resident decedents. But since that time the imposition of inheritance taxes has become general throughout the States, and all such duties have been imposed upon the personal estates of nonresident as well as resident decedents. The Commissioner of Internal Revenue, in order to carry out the obvious intention of Congress to make this tax a general and uniform one, so as to reach all personal property passing from the dead to the living within the United States, in his report for 1900 made the following recommendation (see Treasury Annual Report, 1900, p. 617):

> I recommend that the following amendments to the law relative to the tax on legacies be made:
>
> That in section 29, act of June 13, 1898, there be inserted, after the word "otherwise," the words "including persons residing abroad."
>
> That in section 30, after the words "shall pay to the collector or deputy collector of the district of which the deceased person was a resident," there be inserted the words "*or in which the property was located, in case of nonresidents.*"
>
> These amendments, if made, will provide that estates in this country of persons residing abroad at time of their death shall be taxed the same as estates of persons residing in this country. There should be no unjust discrimination in favor of persons residing abroad whose property is in this country and distributed under our laws. This office has ruled that the tax accrues on legacies in such cases (Treasury

Decisions, 1899, No. 21052), but it would be preferable to have the law specifically so declare, as it has been contended otherwise.

In response to this recommendation, Congress did not insert in section 29 after the word "otherwise" the words "including persons residing abroad," for the very obvious reason that the language of that section was already comprehensive enough. But it did, in section 30, make the amendment suggested, in order to correct the oversight in the administrative portion of the act. So that section 30 now provides (see 31 Stat., 948) that every executor, administrator, or trustee, before payment and distribution, "shall pay to the collector or deputy collector of the district of which the deceased person was a resident, *or in which the property was located in case of nonresidence*, the amount of the duty or tax assessed, etc."

If Congress had amended section 29 as suggested, it might be urged with force that the original language imposing the tax was not broad enough to reach the personal estates of nonresident decedents. But Congress, by declining to amend this section, and by correcting the administrative machinery in the way indicated, has shown conclusively that it intended to subject to this tax the personal estate of nonresident as well as resident decedents.

VI.

But it is urged upon the authority of the case of *United States* v. *Hunnewell* (13 Fed. Rep., 617), that since the law would not reach the personal estate of the

nonresident decedent if she had died intestate, it can not be construed so as to reach the personal estate which she bequeathed by will. Before discussing the *Hunnewell case*, it may be well to call attention to the peculiar facts in No. 295. I suppose counsel would hardly contend that if Madame Ripley-Pinede had left with her agents in New York a deed of trust executed in New York and intended to take effect upon her death so as to dispose of her property in the precise manner in which she did by will, that the passage of the property in that way would not be subject to the legacy tax. And yet she did substantially the same thing. This is not a case of a foreign will, upon which ancillary administration was obtained. The testatrix chose to invest her property in New York. It was not there casually. It was kept there for investment because it was to her interest to have it held and managed in New York. Under all the decisions of our courts that property was subject to taxation in New York. She had a right to make her will abroad. It is claimed she was a resident of France, although she died in Switzerland. But for her own reasons, and probably because she trusted the laws of New York more than the laws of France, she made her will in New York, and she appointed citizens of the United States as her executors. She intended that that will should be fully administered in New York, and it has been so administered. It can not be denied that this will, made and administered in New York, obtained its validity and virtue under the laws of New York.

Evidently, then, whatever passed under this will passed clearly by virtue of the laws of New York; and how absurd it is to rely in this case upon the old maxim *mobilia personam sequuntur*, when the testatrix herself, by her entire course of conduct with reference to her property within the United States, showed clearly that she intended the property to remain here, subject to the laws of this country and not to follow her to France or Switzerland or wherever she might go.

VII.

But to return to the *Hunnewell case*. That case was decided in 1882, long after the act of 1864 had been repealed. It is fair to say it was not elaborately argued. The opinion occupies a little over a page and three cases are cited. The reason given for the decision is that, if the decedent had died intestate, her son would not have taken a distributive share "by the intestate laws by any State or Territory," but, if at all, by the law of France, the domicile of the decedent; and that if the act did not make the duty payable when the decedent died intestate it would not be payable when she died testate. This argument might have been extended further to gifts by saying that if the act did not make the duty payable when the nonresident decedent died intestate, neither would it be payable if he had made a gift by deed or grant, to take effect upon his death. And yet the English courts, while adhering to *Thompson* v. *Advocate-General* (12 Clark & Fin., 1), where the nonresident dies leaving a foreign will, have held, in a number of cases, that a succession

created by a gift of property in England intended to take effect after death is subject to the tax. With respect to this Hanson says (Hanson's Death Duties, bottom p. 531):

> With regard, however, to personal property of which the owner disposes, by deed or instrument *inter vivos*, so as to create a succession, the law of the settler's domicile can have no effect in determining the liability to duty which must, under such circumstances, depend upon the "forum of administration" of the settlement. When this forum is English, e. g., in all cases where the trustees are resident in this country and the settlement is in English form, succession duty will be payable. And this rule has not only been recognized with regard to settlements of personal property created by deed, but has also been extended to cases of succession arising under trusts created by direction of a will.

Whatever may be the law in England, in this country the matter of descent and distribution is regulated by statute, and no property within a State can pass to legatees or distributees except by virtue of and in compliance with the law of the State. This applies to all property, the property of aliens as well as the property of residents. In this connection I beg to refer to the early case of *Mager* v. *Grima* (8 How., 490), growing out of the imposition by the law of Louisiana of a tax of 10 per cent on legacies, when the legatee was neither a citizen of the United States nor domiciled in that State. The act was assailed upon the ground

that it was repugnant to the Constitution of the United States. But the judgment of the State court sustaining the law was affirmed, Mr. Chief Justice Taney, speaking for the court, saying (p. 493):

> Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament or by inheritance, and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. *The right to take is given to the alien, subject to a deduction of 10 per cent for the use of the State.*

The personal property in New York of persons residing abroad is as fully within the dominion of that State as that of persons residing there. The broad power referred to by Chief Justice Taney exists there just as it did in Louisiana. New York has by its law regulated the descent and distribution of such property.

It has given effect to the wills of persons dying abroad upon certain conditions and has directed that property of aliens shall descend in the manner provided by their own law upon certain conditions. But these provisions are the law of the State of New York and the property descends by virtue of that law. In every case the condition is annexed that the property shall contribute to the State by the payment of an inheritance tax. The very fact that such a condition is annexed, shows that there is a passage of the property from the dead to the living under the law of New York. The law of New York gives effect to foreign wills upon certain terms and conditions. When these are complied with, the force of the law of New York flows into the foreign will, giving it strength and effect upon the property located in New York. So in the case of the intestacy of an alien leaving property in New York. After a compliance with certain conditions the law of New York provides that his property shall be disposed of and distributed in a certain way. It adopts the law of his domicil as the rule, but that law has no force of its own in New York. It is the New York law which has force, and so there is a New York intestate law in the case of foreigners as well as of citizens.

Since the law of New York regulates descent in the case of the intestacy of a nonresident as well as of a resident, I submit that Congress never intended to restrict the phrase "the intestate laws of a State" to those laws alone which deal with the intestacy of

residents. It meant to include all laws regulating descent in cases of intestacy, regardless of the domicil of the decedent.

VIII.

No. 295 is not a case of ancillary administration under a foreign will, but No. 287 is, and in support of my contention that the law of New York regulates the transmission of the estates of nonresidents as well as residents, let me refer to the statutes governing foreign wills.

Section 2694 provides that the validity and effect of a testamentary disposition of real property, and the manner in which real property descends where it is not disposed of by will, are regulated by the laws of the State without regard to the residence of the decedent. It then provides:

> *Except where special provision is otherwise made by law*, the validity and effect of the testamentary disposition of any other property situated within the State, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the State or country of which the decedent was a resident at the time of his death.

The New York law gives force and effect to the intestate law of the country of domicil, "except where special provision is otherwise made by law," thus asserting the entire dominion of New York over the subject. This is the intestate law of New York with respect to nonresidents, with the special exceptions indicated.

The succeeding provisions of this chapter relate to the administration of foreign wills through ancillary

letters. In order to carry such wills into effect administration must be taken out under the New York law and all the provisions of this chapter complied with.

Section 2700 directs the person to whom ancillary letters are issued, *unless otherwise ordered by the proper authorities*, to transmit the personal property of the decedent to the country where the principal letters were granted "to be disposed of pursuant to the laws thereof."

Section 2701 authorizes the proper courts of New York to direct the person to whom ancillary letters have been issued either to apply the assets to the payment of the decedent's debts within the State "*or to distribute the same among the legatees or next of kin, or otherwise dispose of the same as justice requires*"

Section 2702 applies to the person to whom ancillary letters have been granted, the general provisions of the laws of New York relating to executors or administrators.

All these provisions show conclusively that no personal property, whether the decedent was a resident or a nonresident of New York, can be transmitted to his legatees or distributees, except after a compliance with the laws of New York relating thereto. The executor, administrator, or trustee acts under the law of New York as a medium for passing such property from the dead to the living. Such transmission, in accordance with the laws of New York, is made taxable by the law of New York, and was intended to be reached by the Federal legacy tax.

IX.

It is urged on the other side that the law must be strictly construed in favor of the exemption or noninclusion of the personal property of nonresidents, and many authorities are cited. In view of the facts to which I have called attention, namely, that the maxim *mobilia personam sequuntur* has not been held to apply within the States either in the taxation of personal property or in the collection of legacy duties, and in view of the general and comprehensive language of the Federal legacy act, I submit that another rule of construction applies, which is thus stated in Cooley on Taxation, second edition, page 204:

> As taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; and it can not be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain. (Citing many cases.)

The only doubtful words in this act are the words "the intestate laws of any State or Territory," and I submit that this phrase may be construed and should be construed so as to include every law of a State or Territory which deals with a case of intestacy, whether of a resident or of a nonresident. The court will not construe these words so as to limit the meaning to the laws defining descent in the case of intestacy of a resident, when there is a law of the State regulating descent where the intestate is a nonresident. Suppose the foreign rule of descent is adopted by the law of

New York, what Mr. Justice Miller said in the *Railroad Tax Cases*, (92 U. S., 612), applies: "But after all, the rule is merely the law of the State which recognizes it."

The construction contended for by the other side destroys the uniformity and equality of the law, for it exempts the transmission of certain personal property from the legacy tax. The States tax all personal property passing after death, regardless of the residence of the decedent. The United States may and ought to do the same. Here then is ground for invoking that other rule to which Mr. Justice White referred in *Knowlton* v. *Moore* (178 U. S., 41, 77):

> We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. (Citing cases.)

X.

To sum up: The right of property does not include the right to dispose of it after death. The power of transmitting property from the dead to the living is a creature of the State. Personal property, as well as real estate, is subject to the dominion of the State wherein located and can be disposed of after death only under and by virtue of its laws. The State which has control may regulate the transmission and annex such conditions as it sees fit. The conditions may affect the disposition of the property and may be made

dependent upon the status of interested parties either to the State or to one another. In other words, citizenship, domicile, relationship, may be used in determining how the property shall pass and what tax shall be imposed upon its transmission. The State may direct that the property shall pass according to relationship in in a fixed way, with no power to direct its disposition otherwise by will, or it may require a portion to pass in a fixed way and permit the decedent by will to control the disposition of the remainder, or it may permit the decedent to dispose of all by will. Again, if a will is permitted, the State may require it to be executed according to its own laws, or permit it to be executed in the manner prescribed by the laws of some other country. If the decedent left no will, the State may require the property to pass according to its own laws, or permit it to pass after the mode fixed by the laws of some other country. At the same time the State may in every case reserve to itself a portion of the personal estate, no matter what the domicil of the decedent was. Since the property in any and every event passes under the law of the State, the State may reserve to itself, in the way of an inheritance tax, a certain percentage of the estate, and only permit the remainder to pass to the legatees or distributees. I refer to all this simply for the purpose of pressing the point that in every instance there is a passage of the property by virtue of the law of the State. The fact that the New York law controls in the passage of the personal estate of nonresidents as well as residents is

conclusively shown by the fact that the New York law takes a part of the personal estate in every instance for its own use, permitting only the remainder to pass.

A reference to the laws of the different States of the Union will show a variety of provisions with respect to the descent of personal property, whether belonging to residents or nonresidents. Each State has felt free to regulate the matter for itself. I may submit to the court in a separate pamphlet a compilation of the laws of the leading States upon this subject.

What I desire especially to urge is that whatever rule may be applied to the personal estate of a nonresident, that rule obtains force and vigor alone from the law of the State which has dominion over the property. If the rule of a foreign country is adopted, it becomes to that extent the law of the State. The law of France has no force in New York unless New York adopts and makes it in a particular case the law of New York, and then it operates as the law of New York, not as the law of France. A foreign administrator has no authority to go into New York and simply by virtue of the letters issued to him abroad take possession of the personal property of a decedent and turn it over to the legatees or distributees. Before he can act as the medium of transmitting such property from the dead to the living he must seek the aid of the law of the State which has control of the property. Application must be made to the proper court for authority to take possession of the property, and a compliance had with all the conditions of the local law respecting the payment of local debts and taxes and the filing of accounts,

etc., before the property can be passed on to the legatees or distributees. When the property does finally pass on, whether by will or by the intestate laws, it passes after a full compliance with the local law and by virtue of that law.

CONCLUSION.

Considerations of public policy are urged by the other side. The taxation of the personal estate of nonresidents is denounced as unequal and unjust. It is urged in one of the briefs that this court institute reform by applying generally, in matters of taxation, the maxim so much relied on, *mobilia personam sequuntur*. Just how the court can do that is not explained. It is conceded that all the State laws imposing inheritance taxes reach the personal estate of nonresident as well as resident decedents. Will this court hold that those provisions are unconstitutional? If so, upon what ground? The court will have to upset a long line of decisions, beginning with *Mager* v. *Grima*, which I have quoted, in order to do that. Or will the court, in deciding this case, apply the "higher law" of *jus gentium* which is invoked, and hold not only that Congress did not intend to tax the transmission of the personal estate of nonresidents, but lacked the power to do so? And if so, upon what ground? If a State may tax the transmission or receipt of personal property within its borders belonging to a nonresident, may not the United States do the same thing? And why ought it not to do the same thing? Is there not a special reason why the United States should collect

this tax, even if the States did not? The persons who live and die abroad leaving personal estates here belong as a rule to one of two classes, either Americans who, for some reason, have renounced their country, or foreigners who prefer, for reasons of profit, to invest their estates here. In either case the stocks and bonds and personal property found in this country after the death of the nonresident, have been kept or placed here for investment because it was advantageous to do so. There is no country which offers such a field for profitable investment as this. It is most natural, therefore, that Americans who prefer to marry or move and live abroad should leave their wealth in the hands of agents here for investment; and the same is true of foreigners who desire to increase their fortunes by profitable investment. They send their money to agents here with authority to invest and reinvest it. Such property does not answer to the "*mobilia*" of the ancient maxim. It does not follow its owner. It is not like money or jewels. It stays here, it is put to use here, and from that use it grows and increases. It receives the protection of our Government and our law and reaps the benefit of the prosperity due to the enterprise and energy of our people. If there is any property which should be required to pay a contribution to the Government, it is such property. Its owner, instead of spending his money here, spends it abroad. We can't make him pay because he stays away; but we can make his personal property pay, especially when disclosed by death, for frequently he manages to conceal it up to that time.

In the case of aliens, it is peculiarly appropriate that their personal estates should be compelled to pay a contribution to the general Government, because they have at all times free access to its courts, and all the powers of the United States are at their disposal for the protection of their rights of property and person. They receive the benefit; let their estates bear at least a slight portion of the burden.

JOHN K. RICHARDS,
Solicitor-General.

NOVEMBER 12, 1901.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FRANK R. MOORE, AS UNITED STATES collector of internal revenue, first district, State of New York, plaintiff in error, *v.* MAX RUCKGABER, SR., AS SOLE EXECUTOR OF the last will and testament of Louisa Augusta Ripley-Pinede, deceased.	No. 295.
FERDINAND EIDMAN, UNITED STATES collector of internal revenue for the third district of New York, plaintiff in error, *v.* MIGUEL R. MARTINEZ, AS ANCILLARY ADMINistrator with the will annexed of Salvador Elizalde, deceased.	No. 287.

BRIEF FOR THE UNITED STATES IN REPLY.

I.

The question before the court is one of construction. The language of the act permits of two constructions. The one taxes all personal property (with the exceptions mentioned in the act) within the United States, passing by will or by descent or by gift to take effect after death. The other exempts such property if the decedent had a domicile abroad at the time of his death.

This exemption is claimed upon the ground that in the transmission and taxation of personal property the maxim *mobilia personam sequuntur* ought to and does apply; and in support opposing counsel rely upon the English case of *Thompson* v. *Advocate-General* (12 Clark and Fin., 1), which has been followed in the United States in *United States* v. *Hunnewell* (13 Fed. Rep., 617). The broad assertion is made that "the English courts, prior to the enactment of the act of 1864, had, without exception, construed the English legacy duty act of 1796 so as not to include legacies passing by the wills of nonresidents" (additional brief, p. 17), and that "by an unbroken line of decisions—we say unbroken, as the one or two cases to the contrary are hardly worth consideration—the doctrine of the maxim '*mobilia*,' etc., has been thoroughly established with reference to legacy tax statutes," etc. (additional brief, p. 42).

It is the purpose of this reply brief to lay before the court the authorities which, I submit, show conclusively:

(1) That for nearly fifty years after the passage of the English legacy act of 1796, the English courts never adopted or applied the maxim "*mobilia*," etc., in its construction. When they did finally adopt it, they did so out of considerations of public policy.

(2) That in place of having been thoroughly established with reference to legacy tax statutes in the United States, this maxim of "*mobilia*," etc., has been repudiated and disregarded, and both the legislation

and the decisions of the States have proceeded upon the theory that the situs of the estate and not the domicile of the decedent ought to control in the levying of inheritance taxes.

II.

THE ENGLISH CASE. (**Thompson v. Advocate Gen., 12 Cl. and Fin., 1.**)

So far from it being true that the English courts did without exception construe the English legacy duty act of 1796 so as not to include legacies passing by the wills of nonresidents, the fact is that in *Attorney-General* v. *Cockerell*, 1 Price, 165 (1814), and *Attorney-General* v. *Beatson*, 7 Price, 560 (1815), the English courts held that the doctrine of the domicile of the decedent did not apply and that the situs of the personal property bequeathed was the determining fact. It was not until thirty years after this that the rule of "*mobilia*," etc., was adopted in the case of *Thompson* v. *Advocate-General*.

Lord Campbell, in his opinion in *Thompson* v. *Advocate-General* (12 Clark and Fin., 1), says, page 28:

> The truth is, my lords, that *the doctrine of domicile has sprung up in this country very recently, and that neither the legislature nor the judges, until within a few years, thought much of it;* but it is a very convenient doctrine; it is now well understood, and I think it solves the difficulty with which this case was surrounded. The doctrine of domicile was certainly not at all regarded in the case of *The Attorney-General* v. *Cockerell* (1814), nor in that of *The Attorney-General* v. *Beatson* (1815). If it had been the

> criterion at that time there would have been no difficulty at all in determining this question; but now, my lords, when we do understand this doctrine better than it was understood formerly, I think that it gives a clue which will help us to a right solution of this question.
>
> It is impossible that the words of the statute can be received without any limitation; foreigners must be excluded. Then the question is, What limitation is to be put upon them? And, I think, the just limitation is the property of persons who die domiciled in Great Britain. On such property alone, I think, can it be supposed that the legislature intended to impose this tax.

The statutory ground for the decision is thus given by the Lord Chancellor, page 20:

> In the very first section of the statute the operation of it is limited to Great Britain. It does not extend to Ireland. It does not extend to the colonies. And therefore, notwithstanding the general terms contained in the schedule, those terms must be read in connection with the first section of the act, and it is clear, therefore, that they must receive that limited construction and interpretation which is alone consistent with the first section of the act.

The language referred to by the Lord Chancellor is evidently the following (see act 36, Geo. III, chap. 52, as amended by act 55, Geo. III, chap. 184, July 11, 1815):

> And be it further enacted, That there shall be raifed, levied and paid unto and for the Ufe of

> His Majefty, his Heirs and Succeffors, *in and throughout the Whole of Great Britain*, for and in refpect of the feveral inftruments, Matters and Things, mentioned and deferibed in the Schedule hereunto annexed * * *

The operation of the English legacy tax was limited to Great Britain, and the question for the court to determine was whether the domicile of the decedent or the location of the legacy controlled. By holding that the domicile of the decedent was controlling, the English court brought within the operation of the English law the personal property of all those who were domiciled in Great Britain, wholly irrespective of the location of the property. How such a construction benefited the revenues of England is well described by Judge Pearson, in his opinion in *Alcany* v. *Powell* (2 Jones, Eq., 51, p. 54):

> But in all cases the question is treated as one affecting the public revenue. It is a probable supposition that in England, for every dollar having its situs there but owned by one domiciled abroad, there are one hundred dollars having its situs abroad but owned by one having his domicile there; so, on the score of revenue alone, the consideration for adopting the principle of the *domicile*, rather than that of the *situs* of the property, was one hundred to one.

III.

THE AMERICAN CASES.

In my brief and opening argument I referred to the many decisions of this court holding that the maxim

"*mobilia personam sequuntur*" was never of universal application, and has been obliged to yield to the exigencies of modern life, so as to permit the actual situs of the property to control in matters of taxation when justice so requires. But I have been challenged, both in the oral argument and in the reply brief, to refer to any cases holding that the maxim does not apply in the construction of a legacy act where the language is not explicit and admits of construction. In other words, the contention is that wherever the courts have been free to apply the maxim, they have done so in construing legacy tax laws so as to exempt the personal property of nonresident decedents from legacy taxes. I shall now refer the court to some of the cases in which the courts of this country have explicitly refused to adopt and apply this maxim, although the language of the acts permitted it.

NORTH CAROLINA.

The North Carolina collateral inheritance act provided that:

> A tax of 1 per cent shall be levied and collected upon the value of all personal property or goods bequeathed to strangers or collateral kindred, or which shall be distributed to or among the next of kin, of any intestate when such next of kin are collateral relations of such intestate.

The construction of this language came before the supreme court of North Carolina in the case of *Alvan* v. *Powell* (2 Jones Eq., 51). It is to be observed that the language admits of construction. It is as doubtful

as the language of the English act. It is susceptible of being construed so as to apply either to all personal property situated within North Carolina or to all personal property belonging to decedents domiciled in North Carolina. The case of *Thompson* v. *Advocate-General* was relied on in support of the latter construction. But the court, after criticising, declined to follow this case, and held that the situs of the property and not the domicile of the decedent should control. The opinion by Judge Pearson contains a lucid analysis of the opinions in the English case. The broad consideration favoring the view taken by the court is thus stated (p. 52):

> If the property of one of our citizens, which is situate here, and passes to strangers or his collateral kindred, is subject to a tax because of the protection it receives under our laws, why should not the property of one who has his domicil abroad but whose property is situate here, is protected here, and is administered here, and passes by force of our laws, be subjected to a like tax?

Respecting the claim that personal property descends by the law of the domicile and therefore the transmission of the personal estate of one domiciled abroad ought not to be taxed, Judge Pearson says (p. 58):

> Our courts from comity adopt and act upon the laws of the country of the domicile, *as our law in reference to the particular case*, so as to hold those entitled who would be entitled according to the law of the country of the domicile; but all this is very far from reaching the

proposition that the property is not administered under *the authority of our courts* and by our law. * * *

The idea that our courts administer the laws of another country is a novel one; but the principle that, in particular cases, our court will adopt and act upon, *as our law*, the laws of another country is a familiar one, and is well settled according to the comity of nations in reference to the disposition of the property of deceased persons who have a foreign domicile, upon the ground that if one makes a will which he believes to be valid, because executed according to the laws of his country, it would be hard to disappoint his intentions by refusing to recognize it as valid in the country where his property may happen to be at the time of his death. Or if one dies intestate, under the belief that his property will belong to certain of his kindred, because such is the law of his country, it would be hard to disappoint his expectations by enforcing the general law of the country where the property happens to be, instead of adopting for his special case the law of his country. When the English courts adopted the law merchant, it could not be said they administered the law of the Romans. When we adopted the law of England *we made it our law*; so, when we adopt the law of a foreign country, for special reasons applying to a particular case, *it is our law*.

When a country adopts a foreign law and applies it to persons and property within its own dominion, it does not subject persons and property under its control

to a foreign jurisdiction. It simply enacts by designation, incorporating into the body of its own law the foreign law which it sees fit to adopt. This practice is not unknown to Congress. In legislating for the Territories Congress has seen fit to adopt the law of a particular State and apply it within the Territory, thus enacting by designation or reference. This was done when Congress applied the laws of Oregon to Alaska (23 Stat., 25) and certain statutes of Nebraska to Oklahoma (26 Stat., 87); but the State law thus adopted *became the Federal law*, otherwise it could have had no force within territory subject to the exclusive jurisdiction of Congress.

The opinion in this case is worth reading. It touches upon nearly every point discussed in the case before the court. It is noticeable that the court took the view that the personal property of a nonresident decedent passes in North Carolina *by virtue of the laws of North Carolina, and therefore, in a case of intestacy, by the intestate laws of North Carolina* The court utterly rejects the view that the law of any foreign country can have any force or effect in North Carolina. North Carolina may, out of comity, adopt the law of another country and make that law its own law, but it then becomes its law and not the law of any other country. Obviously, under this construction, the Federal legacy tax would apply to the personal estates of nonresident decedents in North Carolina, for such estates would either pass by will or by the intestate laws of North Carolina. *But if applicable there, ought not the court to adopt a construction*

making the law applicable everywhere? Does not the uniformity enjoined by the Constitution require that the same legacy tax be imposed and collected in every State under the same circumstances?

MARYLAND.

The Maryland collateral inheritance law (Maryland Code, 1888, vol. 2, p. 1242) subjects to the tax—

> All estates, real, personal, and mixed, money, public and private securities for money of every kind, passing from any person who may die seized and possessed thereof, *being in this State*, or any part of such estate or estates, etc., transferred by deed, etc., to take effect after the death of the grantor, etc.

In the case of *State* v. *Dalrymple*, 70 Md., 295 (1889), the question came before the supreme court of Maryland whether the phrase "being in this State" referred to the estate or to the decedent. The words are equivocal. They may be construed either way. If the court cared to follow the maxim "*mobilia, etc.*," the opportunity was open. It was free to adopt the law of the domicil or the law of the situs in construing the act. The court commented, in its opinion, on the English cases, but it declined to follow them, holding that the situs of the property and not the domicil of the decedent must control. Judge McSherry says (p. 301):

> The tax, we have said, is one on the *transmission* of the property "being in the State," and no reason has been assigned or can be suggested why the broad language of the statute and the evident design of the legislature should

be so narrowed and restricted as to exempt from this tax the property of a nonresident actually here, notwithstanding that same property may, for other purposes, be treated as constructively elsewhere. If we adopt the view insisted on by the appellees *it would result in a discrimination in favor of a nonresident and against our own citizens*, a discrimination, too, which the legislature certainly never intended to make, and for which no warrant whatever can be found in the plain letter of the statute.

PENNSYLVANIA.

The collateral inheritance act of 1887 (Laws of 1887, p. 79) subjects to the tax—

> All estates, real, personal, and mixed, of every kind whatsoever, situated within this State, whether the person or persons dying seized thereof be domiciled within or out of this State, and all such estates, situated in another State, Territory, or country, when the person or persons dying seized thereof shall have their domicil within this commonwealth, *passing from any person who may die seized or possessed of such estates, either by will or under the intestate laws of this State*, etc.

It is to be observed that the language "passing from any person who may die seized or possessed of such estates, *either by will or under the intestate laws of this State*," applies to the estates in Pennsylvania of nonresident decedents, as well as to the estates of resident decedents. Both are treated by the act as passing "either by will or under the intestate laws of this State."

In *Small's Estate*, 151 Pa. St., 1 (1892), it was held that the interest of a nonresident decedent in a partnership carried on in Pennsylvania was liable to the tax. Judge Sterrett says, respecting the maxim "*mobilia personam sequuntur*" (p. 14):

> The partnership property was largely made up of lands, merchandise, flour, grain, and other personal property which had a visible and tangible existence and an actual situs in this State. As was said by Comstock, C. J., in *Hoyt* v. *Comrs.* (23 N. Y., 224, 228), "the fiction or maxim, *mobilia personam sequuntur*, is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice requires. *In other circumstances, the truth and not the fiction affords, as it plainly ought to afford, the rule of action.* * * * *I can think of no more just and appropriate exercise of the sovereignty of a State or nation over property situated within it and protected by its laws than to compel it to contribute toward the maintenance of government and law.*" "A nation within whose territory any personal property is actually situated, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there." (Story's Confl. of Laws, 550.)

NEW YORK.

I have already in my brief (p. 15) quoted at length from the decision of the highest court of New York in the *Matter of the Estate of Romaine* (127 N. Y., 80), in

which it is said there can be no more just and appropriate exercise of the sovereignty of a State or nation over property situated within it and protected by its laws than to compel it to contribute toward the maintenance of government and law. "Accordingly," it is said, "there seems to be no place for the fiction of which we are speaking (*mobilia personam sequuntur*) in a well-adjusted system of taxation."

In the *Matter of Whiting*, 150 N. Y., 27 (1896), wherein it was held that the bonds of foreign as well as domestic corporations, and certificates of stock of domestic corporations owned by a nonresident decedent, but deposited by him in a safe-deposit vault in New York, were subject to taxation under the transfer-tax act, Judge Vann says, respecting the maxim (p. 30):

> The legislature intended, as I think, to repeal the maxim "*mobilia personam sequuntur*," so far as it was an obstacle and to leave it untouched so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of this State.

In other words, the policy of New York has been to refuse to permit the maxim "*mobilia*," etc., to be used for the purpose of exempting personal property situated in the State from legacy taxes, and to employ it only for the purpose of bringing personal property located outside the State within the jurisdiction of its legacy tax laws.

The extent to which New York has carried its policy of bringing every possible subject within the operation

of its inheritance-tax laws appears in the following cases:

In the *Matter of Bronson*, 150 N. Y., 1 (1896), while it was held that the bonds of a New York corporation held by a nonresident decedent at his domicil were not subject to the New York transfer tax, they held that certificates of stock in a New York corporation so held were. This was on the ground that while bondholders are creditors, the owners of stock are shareholders, whose property, in contemplation of law, is located where the corporation exists.

In the *Matter of Houdayer* (150 N. Y., 37) it was held that the individual deposits of a nonresident decedent, made by him with a trust company in New York, are subject to taxation under the transfer tax act. Said the court (p. 40):

> The depositary was a resident corporation, and the receiving and retaining of the money were corporate acts in this State. Its repayment would be a corporate act in this State. Every right springing from the deposit was created by the laws of this State. Every act out of which those rights arose was done in this State. In order to enforce those rights, it was necessary for him to come into this State. Conceding that the deposit was a debt, conceding that it was intangible, still it was property in this State for all practical purposes, and in every reasonable sense within the meaning of the transfer tax act.

In the *Matter of Fitch*, 160 N. Y., 87 (1899), the levying of a transfer tax on shares of stock in a New

York corporation (348 shares of Consolidated Gas) was sustained, although these shares, with the consent of the corporation, had been transferred to the legatees by the Connecticut executor, no administration having been taken out in New York.

IOWA.

While the New York policy has been to use the maxim *mobilia*, etc., only for the purpose of extending the operation of its inheritance-tax laws to personal property located outside of New York, Iowa has, it seems to me, repudiated the maxim altogether The collateral inheritance tax of that State is applied to—

> *All property within the jurisdiction of this State*, and any interest therein, whether belonging to the inhabitants of this State or not. (Code of 1897, section 1467.)

And in *Weaver's Estate* v. *State* (81 N. W. Rep., 603) the supreme court of Iowa held that a herd of cattle upon a farm in Missouri, belonging to a resident of Iowa, who died in Iowa, was not subject to the tax imposed, because the act only applied to property "within the jurisdiction of the State," and this property was without the jurisdiction of Iowa and within the jurisdiction of Missouri. Here the situs of the property, and not the domicil of the decedent, was held controlling.

IV.

I have referred to some, but by no means all, the cases repudiating the doctrine of "*mobilia personam sequuntur*" when applied to matters of taxation. I pass

now to a consideration of the question whether the personal property of a nonresident decedent, dying without a will, may properly be said to pass "by the intestate laws of the State" wherein it is situated. I discussed this question *upon principle* in my brief and on the oral argument. It is my purpose now to refer to the inheritance tax laws and decisions of certain States, for the purpose of showing that such personal property is regarded as passing by the intestate laws of the State wherein it is situated for the purpose of levying legacy taxes.

It is true that, owing to the decision in the *Matter of Enston* (118 N. Y., 174) the collateral inheritance tax law of New York was so amended in 1887, and afterwards construed in the *Matter of Romaine* (127 N. Y., 80), as to offer a basis for the argument made by the other side, that in New York the property of a nonresident decedent is not regarded as passing either by will or by the intestate laws of the State, but is taxed only because it is transferred within the State. The wording of the transfer tax law may be used to support this argument. Of course it has never been necessary in New York to consider carefully and determine definitely whether the personal property of a nonresident decedent does pass by the intestate laws of the State, for the reason that there is an explicit provision that if such property is within the State it shall be subject to the tax.

At the same time, to warrant the New York tax, there must be a transfer within New York for the privilege of which the tax is the price paid, and I am at a

loss to understand how there can be a taxable transfer within New York, unless such transfer takes place by virtue of the laws of New York.

If time permitted, I should like to comment on the New York cases, beginning with *Parsons* v. *Lyman* (20 N. Y., 112), and the New York legislation, on the subject of the descent and distribution of the personal estates of nonresident decedents. The cases and the statutes certainly do not support the claim of the other side that right along the maxim "mobilia," etc., has been followed and the law of the domicil of the decedent at the time of his death been recognized and enforced.

In other words, New York has not acted upon the theory that the personal property of the alien decedent situated within New York is to be treated for all legal purposes as located at the domicil of the decedent at the time of his death. It is true that in *Parsons* v. *Lyman* (20 N. Y., 112) and in *Moultrie* v. *Hunt* (23 N. Y., 395), the law of the domicil of the testator at the time of his death was recognized as the proper rule of decision. But that was only a case of lawmaking through comity. The foreign rule adopted became the law of New York. But the rule recognized in *Moultrie* v. *Hunt* has been changed by legislation; that rule was that the law of the decedent's domicil at the time of his death determined the validity of his will, and in 1876 the legislature changed the law by making the domicil of the testator at the time of the making of his will the test (act of April 11, 1876).

In 1880 the act of 1876 was incorporated into the Civil Code, constituting sections 2611, 2612, and 2613. Thus the law remained until 1893, when the substance of these three sections were incorporated in section 2611 of the Code of Civil Procedure. As the New York law now stands the personal property of a nonresident is not supposed to be located at the place of his domicil at death, nor is the validity of his will determined exclusively by the law of such country. The nonresident may now execute a will according to the laws of New York, or in certain cases according to the law of the State or country where the will may be executed. Further provisions upon the subject of wills are contained in section 2694. I merely refer to the statutes. The court may examine them if it sees fit. As the court will perceive before I get through, I plant my case on broader grounds than a mere State rule or enactment. I plant it on grounds applicable, it seems to me, throughout the entire country.

Several States have adopted the phraseology of the New York collateral inheritance tax law, as amended in 1887: California, in its collateral inheritance tax law of March 23, 1893, as amended by the act of March 9, 1897 (Statutes of 1897, p. 77), held to be constitutional in the case of *In re Wilmerding* (117 Cal., 281), and Montana, in its tax law of March 4, 1897 (Laws of 1897, p. 83), held to be constitutional in *Gelsthorpe* v. *Furnell* (20 Mont., 299). The Michigan act, passed in 1899 (Public Acts 1899, p. 285), was evidently based on the transfer tax law of New York and adopts its phraseology.

ILLINOIS.

The Illinois act, passed June 5, 1895 (Hurd's Statutes, 1899, p. 1460), the constitutionality of which was sustained in *Kochensperger* v. *Drake* (167 Ill., 122), and in *Magoon* v. *Illinois Trust and Savings Bank* (170 U. S., 283), follows the phraseology of the New York collateral inheritance law of 1887 in subjecting to the tax—

> All property, real, personal, and mixed, which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, or, if decedent was not a resident of this State at the time of his death, which property or any part thereof shall be within this State, etc.:

Singularly enough, in the case of *Billings* v. *The People* (189 Ill., 472, 1901) the opportunity presented itself for a construction of the phrase "the intestate laws of this State." It seems that the widow of a resident testator renounced the provision made for her in the will and took her share under the statutes of the State relating to dower. She then contended that the share she thus received did not pass to her "by the intestate laws of the State." The court held it did, saying (bottom p. 477):

> There are no laws of this State which are specifically designated as "intestate laws," and we are called upon to determine what laws or system of laws were referred to under that appellation by the act in question. The same

> term is employed in similar statutes in other States, *and we have no doubt the laws referred to are those laws of the State which govern the devolution of estates of persons dying intestate and include all applicable rules of the common law in force in this State.* The statutes from which we have above quoted are intestate laws and they govern, regulate, and control the interest which the widow, Augusta S. Billings, took in her husband's property at his death. As a general rule the property of persons dying passes in two ways—that is, by will or by descent in the modes provided by law; and when it does not pass *by will it generally passes by law; that is, by the law governing the disposition of property of persons dying intestate.*

This is precisely our understanding of the meaning of the phrase as used in the Federal law. Congress understood that all property which has not been disposed of by gift to take effect after death, passes either by will or by descent in the modes provided by law. When it does not pass by will it passes by law, and the law by which it passes is the intestate law of the State.

MASSACHUSETTS.

The Massachusetts collateral inheritance law passed in 1891 (Statutes of 1891, chap. 425) subjects to the tax—

> All property within the jurisdiction of the Commonwealth and any interest therein, whether belonging to inhabitants of the Commonwealth or not, and whether tangible or intangible,

which shall pass by will or by the intestate laws of the Commonwealth regulating intestate successions, etc.

It is to be observed that while this law subjects all property within the jurisdiction of the Commonwealth to the tax, it only subjects all property within the jurisdiction of the Commonwealth "which shall pass by will or by the intestate laws of the Commonwealth regulating intestate succession." The question whether the personal property of a nonresident decedent who died without a will passed "by the intestate laws of the Commonwealth regulating intestate succession" came before the supreme court of Massachusetts in *Callahan* v. *Woodbridge* (171 Mass., 595). Judge Knowlton, delivering the opinion, said (p. 597):

> The legal right of the legislature to make such a provision in regard to the property of a nonresident owner rests upon the fact that the property is within the State and subject to its jurisdiction. This power is as large in reference to the property of a nonresident decedent as in reference to that of the inhabitants of the Commonwealth. It covers the property within the jurisdiction. The ground for its exercise is that the property has the protection of our laws, and that our laws are invoked for the administration of it when a change of ownership is to be effected.
>
> In the statute before us the succession to property of nonresidents is expressly taxed as any property belonging to inhabitants of the Commonwealth. The language "which shall

> pass by will or by the laws of the Commonwealth regulating intestate succession," taken in connection with the clauses immediately preceding it, applies to foreign wills, and *to property that passes under the statute of this Commonwealth which regulates the succession to the property of a nonresident owner after his death, and declares that it shall be "disposed of according to the laws of the State or country of which he was an inhabitant.*"

Suppose a case like the Hunnewell case would now arise in Massachusetts. Suppose a person domiciled in France should die intestate, leaving personal property in Massachusetts, and both the State and the Federal tax should be resisted on the ground, in the first instance, that the property did not pass "by the intestate laws of the Commonwealth regulating intestate succession," and in the second instance, on the ground that it did not pass "by the intestate laws of any State." Assuredly the supreme court of Massachusetts, following the case of *Callahan* v. *Woodbridge*, would hold that the property did pass "by the intestate laws of the Commonwealth regulating intestate succession." After such a holding, would this court be free to say that the property did not pass by the intestate laws of any State?

Respecting the contention of the other side, that it is not necessary to appeal to the courts of a State in order to transmit the personal property of a nonresident decedent, but that this may be done by a transfer outside of the court, let me refer to the case of *Greves*

v. *Shaw* (173 Mass., 205), in which it was held that the fact that shares of stock in Massachusetts banking and other corporations owned by a nonresident decedent had been transferred by his foreign executor without taking out ancillary administration in Massachusetts did not avail to avoid the Massachusetts inheritance tax. Judge Knowlton said (p 210):

> Since the enactment of the statute of 1891, chapter 425, persons claiming a succession to property in this Commonwealth under nonresident owners must hold their right subject to the prior right of the Commonwealth to have the property administered here, in order that taxes may be paid upon the succession. The fact that the petitioner was able to obtain a transfer of a large part of the stock before the will was proved in this Commonwealth does not affect his duty under the statute to pay the tax.

MAINE.

The Maine law, passed in 1893 (chapter 146), as amended in 1895 (chapters 96 and 124), follows the phraseology of the Massachusetts law in subjecting to the collateral inheritance tax:

> All property within the jurisdiction of this State, and any interest therein, whether belonging to inhabitants of this State or not, and whether tangible or intangible, *which shall pass by will or by the intestate laws of the State*, etc.

The constitutionality of this law was sustained in an elaborate opinion in *State* v. *Hamlin*, 86 Maine, 495 (1895).

OHIO.

Both the Ohio laws, that passed in 1893 (Laws of 1893, p. 14), which imposes a collateral inheritance tax, and that passed in 1894 (Laws of 1894, p. 166), which imposes a direct inheritance tax, use the exact language of the Maine law, and subject to the tax:

> All property within the jurisdiction of this State, and any interest therein, whether belonging to inhabitants of this State or not, and whether tangible or intangible, *which shall pass by will or by the intestate laws of this State*, etc.

CONNECTICUT.

Precisely similar is the collateral inheritance tax of Connecticut (Laws of 1889, p. 106) which applies to—

> All property within the jurisdiction of this State, and any interest therein, whether belonging to inhabitants of this State or not, and whether tangible or intangible, *which shall pass by will or by the intestate laws of this State*, etc.

As in the case of Massachusetts, so in the case of Maine, Ohio, and Connecticut, it is to be observed that the language used by the lawmakers in levying the inheritance tax assumes and recognizes that personal property within the jurisdiction of the State, although belonging to a person not an inhabitant of the State, passes, in case of death, if not by deed to take effect after death, then either "by will or by the intestate laws of the State." *In each of these States there is the conclusive recognition by legislative enactment of a fact which would subject the estate of a nonresident decedent to the Federal legacy tax.*

TENNESSEE.

The act of April 10, 1893 (Acts of 1893, p. 347), follows the phraseology of the Pennsylvania act in providing for the levying of a collateral inheritance tax on—

> All estates, real, personal, and mixed, of every kind whatsoever, situated within this State, whether the persons dying seized thereof be domiciled within or without this State, *passing* from any person who may die seized or possessed of such estates, *either by will or under the intestate laws of this State*, etc.

The constitutionality of this act was sustained in *State* v. *Alston* (94 Tenn., 674). Obviously the legislature of Tennessee took the view that every estate, of whatever nature, situate within that State, if not disposed of by gift to take effect after death, passed "either by will or under the intestate laws of that State." Clearly, then, the personal estate of a nonresident decedent could not escape the Federal tax in Tennessee on the ground urged in this case.

V.

It is urged that the Federal legacy tax does not apply to the estates of nonresident decedents, because there is no method provided for ascertaining the tax. All these objections to the sufficiency of the machinery of the Federal law may be urged with equal force against the application of the State legacy tax to such estates. Nevertheless, the inheritance tax laws of New York, collateral and direct, which have exemptions

and are graded according to kinship and are computed on the "clear market value" of the property transmitted, have been and are daily applied to every variety of personal estate belonging to nonresident decedents. There is no more difficulty in ascertaining and computing the Federal tax than there is in ascertaining and computing the New York tax. The methods followed in one can be used for the other. The easy manner in which speculative difficulties may be surmounted in the administration of such a law is shown in the *Matter of James*, 144 N. Y., 6 (1894). In that case the authority of an executor in charge of an estate consisting partly of personalty located in England, and partly of personalty located in New York, to pay certain legacies to collaterals out of the English estate and pass the New York estate on to direct heirs, so as to escape the collateral inheritance tax, was sustained. The court pointed out (p. 11) that the fact of such appropriation would, of course, appear upon the account of the executor. If the executor determined to pay the legacies from the English estate, the American estate would be freed from the burden of the special tax. It would be an easy matter for the person in charge of the property within the United States to submit a statement showing that he had or was going to dispose of the property in such a way as to exempt it from the payment of the Federal tax. There was no difficulty in either of the cases at bar in presenting to the proper authorities the real facts affecting the disposition of the American estates of the nonresident decedents.

VI.

If time permitted, I should take pleasure in personally examining the laws of all the States regulating the descent and distribution of the personal estates of nonresident decedents. It is not possible for me to do this. As illustrating the fact that there is a diversity of State laws upon this subject, I print as an appendix extracts from the brief of Mr. George H. Pettit, United States attorney, filed in the circuit court of appeals in the Ruckgaber case. The lesson to be drawn from the variety of provisions is that to make the Federal legacy tax uniform and equal, this court must reject the fiction of the domicile and follow the fact of the situs. In no other way can the law be fairly enforced or the intention of Congress carried into effect. Suppose the court adopts the maxim "*mobilia*," etc., as the rule in interpreting and applying the Federal act. For the purpose of this rule each State is foreign to every other State. If, then, a citizen of Iowa dies in that State leaving personal property in Missouri, which is not within the custody of the Iowa executor or administrator, the Federal officers may be met with this situation when they attempt to collect the tax. The Iowa executor may decline to pay the tax because the Missouri property is not in his custody nor within the jurisdiction of Iowa, the law only applying to personal property which he has in charge. If the Federal officers attempt to collect the tax in Missouri, they may be met with the maxim '*mobilia*," etc., and the assertion that the personal property in Missouri is not

subject to the tax because it follows the domicile of its owner and is deemed to be situated in Iowa. The way out of this difficulty is to tax the transmission of the property where the property actually is when transferred. This the Federal act evidently contemplates, for it makes the person in charge of the personal property liable for the tax and provides that the tax shall be a lien upon the property. The law does not look to the legatee or impose any liability upon him because of the receipt of the property.

In *United States* v. *Allen* (9 Ben., 154; 24 Fed. Cases, 770) it was held that the Federal legacy tax of 1864 imposed a tax *in personam* only on the executor and not on the legatee; that the remedy was either against the executor by a proceeding *in personam* or against the property by a proceeding *in rem*. In this case there was an attempt to sue the legatee personally, which failed. Judge Blatchford, after referring to the provisions of the law, said:

> The executor is made subject to the tax, not the legatee. The executor is to pay the tax, not the legatee. The executor is to make the statement, not the legatee. The executor is to receive the receipt from the collector, not the legatee. If the executor neglects to pay the tax, or to deliver the statement, or violates the requirements of the statute, it is not provided that a suit shall lie against the legatee, in personam, to recover the tax, but that there shall be proceedings to enforce and realize the lien on the property or personal estate of the deceased. Those

proceedings are to be in the nature of proceedings in rem, to subject the property of the deceased in the hands of any person who may have the custody or possession of it, to sale, to pay the tax.

Thus it appears that the essential thing is the presence of the property within the jurisdiction of the United States. The remedy is against the property or the person in custody of it, not against the legatee.

VII.

The Federal tax rests not upon the power to regulate the descent but upon the fact of the transmission of personal property. The fact that the States have the power to regulate the descent and distribution of the personal property of nonresident decedents within their jurisdiction should lead this court, in construing the law before it, *to presume conclusively that the States have done this in every case;* in other words, to presume conclusively that in every case personal property within a State, which has not been disposed of by gift to take effect after death, in passing from the dead to the living, does so either by will or by the intestate laws of the State. If this is not conclusively presumed, then it remains with the State, which has full power to regulate, to say whether such property shall or shall not pass by will or by the intestate laws of the State; that is, by enactment or decision to determine whether the Federal legacy tax shall or shall not be collected on such property within its limits.

Every State has complete dominion over personal

property situated within it, and may regulate its descent or distribution, regardless of where its owner was domiciled when he died. It may enact a body of laws regulating in detail the descent in case of the intestacy of a nonresident, or it may by a general law adopt the laws of the country of the domicile of the intestate for the purpose of determining how his personal property shall pass Will this court say that if a State does the first thing the transmission of the nonresident's property shall be taxed under the Federal law, and if it does the second thing that it shall not be taxed? Will the court permit a fiction to abrogate the uniformity enjoined by the Constitution? The situation here is not akin to that in England when the maxim "*mobilia*," etc., was adopted and applied. Parliament had full power both to regulate and to tax. Congress has no right to regulate; it has only the power to tax. The power to regulate rests with the State. Congress in legislating for the Union assumes this fact. It acts upon the supposition that each State has regulated the descent of personal property within its borders; that the State law controls and not the law of any foreign country. Congress recognizes that all property within the States is subject to the State law and must be passed from the dead to the living by virtue of the State law, that is, either by will or by the law of the State which operates when there is no will. The latter is the intestate law of the State, and it applies as well to nonresidents as to residents. Congress never intended that the States, by any legerdemain,

by any use of fiction instead of fact, should be left free to limit or restrain the Federal Government in the imposition and collection of this duty. Congress did not intend to leave a State free to collect the tax itself because there was a transfer under its laws, within the scope of its jurisdiction, and yet, either by enactment or decision, deprive the Federal Government of the benefit of taxing the same transfer.

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 17, 1901.

APPENDIX.

SECTIONS 29, 30, AND 31 OF THE ACT OF JUNE 13, 1898 (30 STAT., 464), AS AMENDED MARCH 2, 1901 (31 STAT., 948).

[The amendments are indicated by brackets. The italics indicate provisions to which the attention of the court is directed.]

SEC. 29. That *any person or persons having in charge* or trust, as administrators, executors, or trustees, *any legacies or distributive shares* arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, *passing*, after the passage of this act, from any person possessed of such property, *either by will or by the intestate laws of any State or Territory*, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, *shall be, and hereby are, made subject to a duty or tax, to be paid to the United States*, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

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Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: Provided, That all legacies or property *passing by will, or by the laws of any State or Territory,* to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set

forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

SEC. 30 (as amended). That the tax or duty aforesaid [shall be due and payable in one year after the death of the testator and] *shall be a lien and charge upon the property* of every person who may die as aforesaid, for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States: [and every executor, administrator, or trustee having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof, in writing, to the collector or deputy collector of the district where the deceased grantor or bargainer last resided within thirty days after he shall have taken charge of such trust,] and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident [*or in which the property was located in case of nonresidents,*] the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of

the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain *the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest*, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property,

or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, *or where no administration upon such property or personal estate, shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same to be sold upon the judgment or decree of such court,* and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, *to be paid under its direction to such person or persons as shall establish title to the same.* The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from

the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge, or custody any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of five hundred dollars: *Provided*, That in all legal controversies where such deed or title shall be the subject of judicial investigation the recital in said deed shall be prima facie evidence of its truth and that the requirements of the law had been complied with by the officers of the Government: [*And, provided further*, That in case of willful neglect, refusal, or false statement by such executor, administrator, or trustee, as aforesaid, he shall be liable to a penalty of not exceeding one thousand dollars, to be recovered with costs of suit. Any tax paid under the provisions of sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged.]

SEC. 31. *That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act.*

THE DIVERSITY OF STATE LAWS.

[From Mr. Pettit's brief below.]

MAINE.

The laws of Maine provide that—

> When administration is taken in this State on the estate of any person, who, at the time of his death, was not an inhabitant thereof, his estate found here, after payment of his debts, shall be disposed of according to his last will, duly executed *according to the laws of this State*, if he left any; but if not his real estate shall descend according to the laws of this State; and his personal estate shall be distributed according to the laws of the State or country of which he was an inhabitant; and the judge of probate, as he thinks best, may distribute the residue of said personal estate as aforesaid, or transmit it to the foreign executor or administrator, if any, to be distributed according to the law of the place where the deceased had his domicile. (Revised Statutes, chap. 65, sec. 36.)

The State of Maine thus makes a difference between testacy and intestacy that does not support the theory of the Hunnewell case. If the deceased leaves a will it must be according to the law of the State, when his property would certainly pass by the law of that State, and the executor be liable for the tax if the other conditions prevailed, while if the decedent died intestate the law of the domicile would apply, and, if the executor's contention in this case is correct, he would not be liable for the tax.

MISSISSIPPI.

In Mississippi all personal property follows one rule, and it *appears that the law of the domicile is not recognized.* The laws of that State provide:

> SEC. 1542. All personal property situated in this State shall descend and be distributed according to the laws of this State, regulating the descent and distribution of such property, regardless of all marital rights which may have accrued in other States, and notwithstanding the domicile of the deceased may have been in another State, and whether the heirs or persons entitled to distribution be in this State or not; and the widow of such deceased person shall take her share in the personal estate according to the laws of this State. (Annotated Code of Mississippi.)

WASHINGTON.

In the State of Washington there appears to be no distinction drawn between the estates of resident and nonresident intestates in its Statutes of Distribution. Ballinger's Codes and Statutes, vol. 2, sec. 6121, provides that—

> All provisions of law relating to the carrying into effect of domestic wills after probate shall, so far as applicable, apply to foreign wills admitted to probate in this State, as contemplated in the preceding section.

The preceding section provides that foreign wills, executed with certain formalities, be admitted to probate in this State.

WYOMING.

The laws of the State of Wyoming provide that—

> When administration shall be taken in this Territory on the estate of any person who at

> the time of his decease was an inhabitant of any other State or country, his real estate found here, after the payment of his debts, shall be disposed of according to his last will according to the laws of this Territory, and his personal estate according to his last will according to the laws of his domicile; and if there should be no such will his real estate shall descend according to the laws of this Territory, and his personal estate shall be distributed and disposed of according to the laws of the State or country of which he was an inhabitant. (Revised Statutes, sec. 2195.)

This State's law thus provides that the nonresident's will shall be good if executed according to the place of his "domicile," but if he dies intestate then his property passes according to the law of the State or country of which he was an "inhabitant." The words are held in some States to have different meanings. A man may have his domicile in one State, but reside in and be an inhabitant of another State. And the conditions of testacy and intestacy might lead to very different results and situations in Wyoming under the legacy tax law, but in any event the succession must be as directed by the Wyoming law, for this very section is the only authority of the successor to take at all under any rule.

KANSAS.

In the State of Kansas, in case of intestacy, personal property is distributed in the same manner as real estate; and there appears to be no expressed distinction between resident and nonresident intestates, and the provision of law appears to be as follows, in regard to wills:

> If on hearing it shall appear to the court that the instrument (i. e., a foreign will executed,

> proved, and allowed abroad) ought to be allowed in this State, the court shall order the copy to be filed and recorded, and the will and the probate and record thereof shall then have the same force and effect as if the will had been originally proved and allowed in the same court in the usual manner; but nothing herein contained shall be construed to give any operation or effect to the will of an alien different from what it would have had if originally proved and allowed in this State. (General Statutes, vol. 2, p. 566, sec. 57.)

COLORADO.

In the State of Colorado there appears to be no distinction drawn in the Statute of Distributions between resident and nonresident intestates. Statutes, vol. 1, page 421, sec. 99, is as follows:

> The personal estate of an alien, dying intestate, who, at the time of his death, shall reside in this State, shall be distributed in the same manner as the estate of natural born citizens; and all persons shall be entitled to their proper distributive shares of such estate under the laws of this State, whether they are aliens or not.

NEBRASKA.

In the State of Nebraska the law provides as follows:

> When any will shall be allowed as mentioned in the preceding section (i. e., a foreign will allowed in this State), the probate court shall grant letters testamentary or letters of administration with the will annexed, and such letters testamentary or letters of administration shall extend to all the estate of the testator in this State; and such estate, after payment of his just debts and expenses of administration, shall be disposed of according to such will, so far as such will may operate upon it, and the residue

shall be disposed of as is provided by law in cases of estates in this State belonging to persons who are inhabitants of any other Territory, State, or country. (Compiled Statutes, sec. 2661.)

And in section 2691 it further provides:

When any person shall die intestate, being an inhabitant of this State, letters of administration of his estate shall be granted by the probate court of the county of which he was an inhabitant or resident at the time of his death. If such deceased person, at the time of his death, resided in any other Territory, State, or county, leaving estate to be administered in this State, administration thereof shall be granted by the probate court of any county in which there shall be estate to be administered; and the administration first legally granted shall extend to all the estate of the deceased in this State, and shall exclude the jurisdiction of the probate court of every other county.

CALIFORNIA.

The State of California and other States and Territories have sections in their general laws or codes apparently the same, copied either literally or in substance from California; among them are Idaho, Montana, Arizona, and Oklahoma, and the provision is as follows:

Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this State, leaving a will which has been duly proved or allowed in the State of his residence, and an authenticated copy thereof has been admitted to probate in this State, and it is necessary in order that the estate, or any part thereof, may be distributed according to the will that the estate in this State should be delivered to the

> executor or administrator in the State or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate and a like delivery of the proceeds. (California Code Civil Procedure, sec. 1667.)

Is not the distribution of the decedent's estate here contemplated according to the law of California or the other State or Territory having the same rule where the property may be situated? If not, why was any law on the subject necessary?

DELAWARE.

The laws of Delaware provide as follows:

> Administration of the goods and chattels, rights and credits of an intestate shall be granted by the register of the county in which he resided at the time of his death; or, if the intestate did not reside in the State, then by the register of any county wherein he has any estate, personal or real; and the administration which shall be first lawfully granted in the last-mentioned case or in the case mentioned in the next paragraph, shall extend to all the estate within the State and shall exclude the jurisdiction of the register in any other county.
>
> If in any case it be expedient that administration be granted upon the estate of a nonresident who left a will proved in another State or country, it may be granted by the register of either county to any suitable person. (Revised Code, 1852, as amended 1893, chap. 89, sec. 8.)

There are many of the States of the Union that do not seem to take any notice of the residence or nonresidence of the decedent, but treat the estates of both alike. And in the American and English Encyclopædia of Law, 2d ed., vol. 13, page 938, it is stated that *only seventeen of the States of the Union apply the*

so-called law of the domicile in dealing with the estates of nonresident decedents. And the footnote to this work specifies the States of the Union in which this law of the domicile applies as Alabama, Arkansas, Connecticut, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, New Jersey, New York, Ohio, Pennsylvania, and Vermont.

PENNSYLVANIA.

In the State of Pennsylvania the same doctrine seems to prevail as in the State of New York, relating to the administration of the property therein of deceased nonresidents, except that the legislature of Pennsylvania deemed it necessary to pass a law authorizing aliens to make a will, evidently regarding them as not having such power without it. In Pepper and Lewis' Digest, vol. 1, page 116, they give the law of that State as follows:

> 1. Every person, being a citizen or subject of any foreign State, shall be able and capable in law of acquiring and taking, by devise or descent, lands and other real property in this Commonwealth, and of holding and disposing of the same in as full and ample a manner as the citizens of this State may or can do, and no such lands or estates so held by devise or descent shall escheat or be forfeited to the Commonwealth, for or on account of the alienage of such person claiming the same under any last will, or succeeding thereto, according to the laws of this Commonwealth.
>
> 2. All such persons shall be able and capable in law to dispose of any goods and effects to which they may be entitled within this State, either by testament, donation, or otherwise, and their representatives, in whatever place they may reside, shall receive the succession, according to the laws of this Commonwealth, either

> in person or by attorney, in the same manner as if they were citizens of this Commonwealth. (Laws of 1871.)

The State thus determines at the outset whether or not there shall be any succession at all by will. But the courts of the State will not themselves administer the estates of nonresident decedents, unless there is no one in the State who is entitled to receive the property or any portion of it: when they will direct the transmission of the property remaining after the payment of the debts to the place of residence of the deceased to be distributed to the persons there entitled to it. However, the courts regard themselves as acting under their own law, and not under the law of some other State or country. And this is one of the States where it is supposed the law of the domicile of a nonresident is applied in disposing of such estates.

In the *Matter of Deal's Appeal* (10 Harris, 22 Penn., p. 519) Chief Justice Lewis, speaking of the alleged distinction between, and the power and duties of, ancillary and ordinary executors and administrators, says:

> They are occasionally described by different terms—the administrator of the *domicile* is sometimes called the *principal*, and sometimes the primary administrator—and the administrator of the *situs* is frequently called the auxiliary, and oftener the ancillary administrator. But it does not matter what terms are used to designate the distinction in fact as to the objects of the different administrators, so that we guard ourselves against the conclusion that there is a designation in law as to the rights of the parties entitled as distributees. It was truly said by the judge who delivered the opinion of the court in *Harvey* v *Richards* (1 Mason R., 381) that, there is no magic in the words, and

that each of the administrators may properly be considered as a principal under that reference to the limits of its exclusive authority, and each might under circumstances be justly deemed *auxiliary* administrator. Although the right of succession to personal assets of an intestate is to be regulated by the law of the country of which he was domiciled at the time of his death, it is fully settled that the *administration* of the estate must be *in the country in which possession of it is taken and held under lawful authority.*

Again, in the case of *Parker's Appeal* (61 Penn., 484), the Supreme Court, by Chief Justice Thompson, says:

The case of *Mothland* v. *Wierman* (3 Penn.) and *Dent's Appeal* (10 Harris, 514) abundantly show that assets are not to be transmitted to the administrator or executor of the domicile when there are domestic claimants or claimants within the jurisdiction of the ancillary administration. It would be a waste of time to discuss what we see so ably discussed in the opinion of Lewis, C. J., in the last-mentioned case.

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No. 287.

FILED
NOV 15 1901

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 287.

Filed Nov. 15, 1901.

FERDINAND EIDMAN, U. S. Collector of Internal Revenue for the Third District of New York,

Plaintiff in Error below,

vs.

MIGUEL R. MARTINEZ, as Ancillary Administrator with the Will Annexed of SALVADOR ELIZALDE, deceased,

Defendant in Error below.

On a Certificate from the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR DEFENDANT IN ERROR BELOW.

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Supreme Court of the United States.

FERDINAND EIDMAN, U. S. Collector of Internal Revenue for the Third District of New York,
Plff. in error below,

against

MIGUEL R. MARTINEZ, as Ancillary Administrator with will annexed of SALVADOR ELIZALDE, deceased,
Deft. in Error below.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Questions certified to this Court by the United States Circuit Court of Appeals for the Second Circuit, on the hearing of a writ of error to the Circuit Court of the United States for the Southern District of New York, in a suit therein brought by the defendant in error, ancillary administrator against the plaintiff in error collector, to recover the amount of certain taxes, on the passing of legacies and distributive shares which had been assessed by the plaintiff in error on certain securities found in the city of New York, and passing under the laws of Spain, and under the will of Salvador Elizalde, a citizen of Spain, who died in Paris, France, to

a legatee and distributee, who resided and resides abroad, and paid under protest by defendant in error, ancillary administrator, in which suit the plaintiff in error, collector, demurred to the complaint, and the demurrer was overruled by the Court, and, the defendant collector electing not to answer, but to stand on his demurrer, judgment was entered against him by said Circuit Court for $4,451.25 damages and costs.

Statement.

The statement of facts made by the Court below on which the questions are certified is substantially as follows:

Salvador Elizalde was a subject of the King of Spain. He had never resided in the United States. He died in Paris, France, April 27, 1899. He left a will in the Spanish language executed in Paris in the year 1891. He left a son, Arturo Elizalde, who is his sole next of kin, who, under the laws and treaties between France and Spain, became entitled to the possession and administration of all the personal property of the decedent.

The will was filed and protocolized in the office of the Spanish Consul in Paris. Said Arturo is the only son and sole next of kin of decedent. He is a Spanish subject and has never resided in the United States.

Said will gives all the property of decedent to said Arturo; but by the laws of Spain two-thirds of the property of decedent passed to said Arturo by force of the laws of Spain and but one-third passed by force of the will. In other words, said Arturo was a forced heir to the extent of two-thirds of the property left by the deceased.

Certain federal, municipal and corporate bonds belonging to the deceased were, at the time of his death, in the custody of his agents in the city of New York in the Third Collection District.

Arturo Elizalde entered upon the administration of the estate of his father and pursuant to § 2695 and 2696 of the New York Code of Procedure appointed defendant in error Martinez his attorney to receive ancillary letters in New York, and such letters were issued to him by the Surrogate of the County of New York, and thereupon said Martinez took possession of said bonds.

Upon the passing of the said legacy and distributive share to Arturo Elizalde the U. S. Internal Revenue Collector assessed a tax of $4,293.76. Defendant in error paid the tax upon the compulsion of the collector's threat of distraint and sale and under protest and made due application for refund, which was rejected, and thereupon brought suit in the Circuit Court below against the collector to recover the tax and to his complaint the collector demurred. The demurrer was overruled and judgment entered thereon for the amount claimed, and the collector took a writ of error to the Circuit Court of Appeals which certified two questions:

1. Is any tax imposed by the 29th and 30th sections of the Act of June 13, 1896, upon the passing of any legacy arising out of the personal property of a non-resident alien who has never resided or had a domicile within the United States and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicile pursuant to the laws thereof by which he gives all his property to a non-resident alien legatee, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

2. Is any tax or duty imposed by the 29th and 30th sections of the Act of Congress of June 13th, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes" upon the passing of any distributive share arising out of the personal property of a non-resident alien who has never resided or had a domicile

within the United States and who dies without the United States in the year 1899 intestate, and by the law of his foreign domicile all of his personal property passes to his son, also a non resident alien, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

See Record, pp. 1 and 2.

In the first question as *printed* in the record, there is a clerical error of the date of the Act of Congress—viz., 1896, which obviously should be 1898.

It is correctly stated in the second question and also in the statement of facts on p. 1.

POINTS

First—The statute under which these questions arise was passed by Congress June 13, *1898*. 30th. Stat. at Large, ch. 448, p. 464.

It imposes a tax on the passing of legacies and distributive shares arising from personal property passing after the passage of the act from any person possessed of such property "*either by will or by the intestate laws of any State or Territory.*"

In this case the property did not pass by the distributive laws of any State or Territory. Two-thirds of it did pass by the *distributive* laws of Spain.

One-third of it did pass by a will—but the will was executed according to the laws of Spain by an alien never residing or domiciled in the United States.

The question is: do the words of the statute, "passing * * * either by will or by the intestate laws of any State or Territory," cover this case?

If the property were not actually found here, of

course no one would pretend that the statute covered this case. The whole matter would be outside of our jurisdiction.

Does the fact that personal property is actually found here make any difference? If it makes none as to that passing by the distributive law of Spain outside of the will, does it make any as to that passing by the will?

It should also be here stated that the act of 1898 so far as these questions are concerned, is in the very words of the legacy and distributive share act of 1864, and that before the enactment of the act of 1898 the act of 1864 had been subjected to judicial construction. See 13 Stat. at Large, p. 285, § 124.

Second.—We desire most strenuously to impress upon the Court the point that the law in question must be strictly construed in favor of the exemption or non-inclusion of this property.

It is scarcely necessary to cite authority to show that laws imposing taxes are to be strictly construed, except such parts of them as are remedial in their nature. The English cases on this subject are clear and consistent. In Warrington *vs.* Furbor, 8 East., 242, at 247, Lord ELLENBOROUGH said:

> "Where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out, and we should give a liberal construction to words of exception confining the operation of the duty."

And in William *vs.* Sangar, 10 East., 66, at page 69, he said:

> "In the construction of these tax acts we must look to the strict words, however we may sometimes lament the generality of the expressions used in them; but we must construe those

words according to their plain meaning with reference to the subject matter."

In Denn *vs.* Diamond, 4 B. & C., 225, at page 245, the Court said:

> "It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language."

In Tompkins *vs.* Ashby, 6 B. & C., at page 541, it was said:

> "Acts of Parliament imposing duties are so to be construed as not to make any instrument liable to them, unless manifestly within the intention of the legislature"

And in Doe *vs.* Smith, 8 Bing., 142, at page 152, the Court said:

> "As all stamp acts, being a burden on the subject, must be clearly expressed wherever they impose the burden, I should say that, even if there were doubt, we should take the smaller sum."

In Wroughton *vs.* Turtle, 11 Mees. & W., 561, at page 567, the Court said:

> "It is a well settled rule of law that every charge on the subject must be imposed by clear and unambiguous words."

This rule of construction has been repeated and approved in many other cases in England. See Marquis of Chandos *vs.* Commissioner of Inland Revenue, 6 Exch., 464, and Gurr *vs.* Scudds, 11 Exch., 190, in which it was said:

> "If there is any doubt as to the meaning of the stamp act it ought to be construed in favor of the subject, because a tax cannot be imposed without clear and express words for that purpose."

"It is a well-settled rule of law," says Dwarris on Statutes, 749, "that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public, because it is a general rule that, where the public are to be charged with a burden, the intention of the Legislature to impose that burden must be explicitly and distinctly shown."

We concede that remedial provisions contained in revenue laws do not come within the rule for which we are now contending, but are to be liberally construed.

See

Taylor *vs.* U. S., 3 How., 197.
Cliquot Champagne Case, 8 Wall., 114.
U. S. *vs.* Hobson, 10 Wall., 395.
Smythe *vs.* Fiske, 23 Wall., 374.

Judge COOLEY, in a note referring to the case of Taylor *vs.* United States, cited above, says:

> "The opinion in this last case was given by Mr. Justice STORY, and the language made use of, which consists largely in a quotation from the opinion given in the lower Court, does not express his own views so clearly as was customary with that learned Judge. What is manifest in his opinion is that the point was not regarded as of importance in that case, the meaning of the statute being plain; and while the distinction pointed out by the lower Court between penal and remedial laws is approved, and shown to be in accordance with the authorities, it is not clear that the general remarks of the Judge were intended to go further. It would have been a remarkable circumstance if

> Mr. Justice Story had overruled his own opinion, delivered so recently that, at that time, his son [and reporter] had not issued the volume containing it" (Cooley on Taxation, 205).

The opinion last referred to in this extract was given in the case of United States *vs.* Wigglesworth, 2 Story, 369, in which Mr. Justice STORY said:

> "In the first place it is, as I conceive, a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the Government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense either remedial laws, or laws found upon any permanent public policy, and, therefore, are not to be liberally construed."

It was said also by Mr. Justice NELSON in Powers *vs.* Barney, 5 Blatch., 202, that duties "are never imposed upon the citizen upon vague or doubtful interpretations;" and in U. S. *vs.* Watts, 1 Bond, 580, at page 583, it was said:

> "The * * * revenue laws can not be so construed as to extend their meaning beyond the clear import of the words used."

Third.—Statutes similar to the U. S. statute in question have always been held not to cover a

legacy given in a will of a foreign domiciled testator or a distributive share passing by the laws of a foreign country wherein the deceased was domiciled at the time of his death.

The English Legacy Tax Act of 1796 is in the following language:

"§ 2. And be it further enacted that upon every legacy, specific or pecuniary, or of any other description of the amount or value of twenty pounds or more given by any will or testamentary instrument of any person who shall die after the passing of this act out of the personal estate of the person so dying and also upon the clear residue and upon every part of the clear residue of the personal estate * * * which shall remain after deducting debts, funeral expenses and other charges * * * or upon intestacy there shall be raised, levied, collected and paid * * * the several duties, and after the rates and in manner following."

36 Geo. 3d, c. 52; Hanson Death Duties, p. 391 *et seq.*

This and our statute are substantially identical. The one levies a duty on a *legacy* "given by *any* will and upon the clear residue in case of intestacy of any person who shall die after the passing of this act." The other levies a duty or tax on legacies or distributive shares "passing after the passage of this act * * * either by will or by the intestate laws of any State or Territory."

The two sets of words describe the same event as the occasion for the tax and levy the tax in respect to the same thing and upon the same person or persons, *i. e.*, upon the legatee or distributee.

The English Courts in construing their statute have without a single exception held that the statute did not cover a legacy given by the will of one domiciled abroad or a distributive share of the estate of one domiciled abroad.

In Thomson *vs.* Advocate General, 12 Clark & Finelly, 1, it was held that a legacy given by the will of one domiciled in Demarara was not taxable under the act, although the property consisted of a debt due to the deceased from one living in Scotland, to collect which the legatee had taken out letters in Scotland.

The decision was *placed* upon the specific ground that the language of the act, though general, must be restricted in its application to legacies or distributive shares passing from a person domiciled in Great Britain and did not apply to those domiciled elsewhere because of the maxim *mobilia sequuntur personam.*

There was no other question in that case and the decision was unanimous.

That decision has never been challenged in any respect in England.

In 1853 the succession tax was passed in England (16 & 17 Victoria C., 51), and is in these words:

"Every past or future disposition of property by reason whereof any person has or shall have become beneficially entitled to any property or the income thereof upon the death of any person * * * shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession."

In 1859 the question of the construction of this act came before the Court in Matter of Lovelace's Settlement, 61 Eng. Ch. Rep. (4 De Gex and Jones), 340.

That was a case of a marriage settlement between English people wherein the woman transferred certain property to English trustees upon certain trusts and in certain contingencies reserving a power of appointment. After marriage the parties removed to France and died, Mrs. Lovelace dying last, and having exercised the power.

The question was whether succession duty was payable.

It was held that it was, on the ground that the property was owned by the trustees in England and was not part of Mrs. Lovelace's estate at her death in which case it would not have been liable to legacy duty (see p. 351).

In 1864 the same question came before the Court in the Matter of Wallop, 66 Eng. Ch. Rep. (1 De Gex' Jones & Smith), 656, and was decided the same way.

In this case the settlement was made by the will of an English resident and gave property to trustees upon certain trusts and finally to the appointees of his daughter, who, after her father's death married, moved abroad, appointed by will and died.

The Court held that no legacy duty was payable—(p. 669-670), but held that a succession duty was payable.

In 1865 the question arose in Wallace *vs.* Attorney Gen'l and Jeves *vs.* Shadwell, L. R., 1 Ch. Appeals, 1, whether a succession duty is payable because of personal property being in England where the testator died domiciled in France.

This case in its facts is like that of Thomson *vs.* Advocate General, and differs from the two preceding in that there was no settlement or trust in England, and the question arose of the application of the *succession* tax law to a mere case of a "disposition" by will of one domiciled in a foreign country.

It was held that no succession tax was payable.

Lord Cranworth said that no succession tax could be payable unless one became "Entitled by virtue of the laws of this country."

In 1872, the case of Attorney-General *vs.* Campbell, L. R., 5 Eng. and Irish Appeals, 524, came before the House of Lords.

It was the case of a *settlement* and the property was in the hands of English trustees and a subsequent devolution was held to be subject to a succession duty.

On p. 530 Lord Westbury speaks of the contention of the Crown in Wallace *vs.* The Attorney-General, L. R., 1 Ch. App., 1, as "where the extraordinary conclusion was contended for that under the *will* of a gentleman dying domiciled abroad the first legatee, though he was not liable to legacy duty, became liable to succession duty under the Act." italics ours.

In 1872, also the case of Lyall *vs.* Lyall, L. R., 15 Equity Cases, 1 42 L. J. N. S., Part 1, p. 195, came before the Master of the Rolls, Lord Romilly.

In that case there was a marriage settlement and the property vested in trustees domiciled in England, and the quession was as to a *succession* tax.

This case is remarkable for the discussion by Lord Romilly of the preceding cases and his vigorous dissent from the doctrine that an English settlement and the fact that the trustees were domiciled in England, made the estate of foreign beneficiaries liable to the succession tax.

In the opinion of Lord Romilly the doctrine of Thomson *vs.* Advocate-General and of Attorney-General *vs.* Wallace should apply, and such estates not be subject to the succession tax.

In deference, however, to the decision in Attorney-General *vs.* Campbell he held that the estate was liable to succession tax, although he says, p. 15, that "it appears to me that the distinction drawn between the two statutes is extremely thin, and that the arguments against legacy duty as stated in Thomson *vs.* Advocate-General apply with equal force to the words of this statute," meaning the succession statute.

In 1877 in Cigala Settlement Trusts, L. R., 7 Ch. Div., 351, the same doctrine was held. The property was "vested in trustees subject to British jurisdiction," *i. e.*, domiciled in England and because of that was held subject to the succession tax.

The last case in England is that of Atty.-Gen'l. *vs.* Jewish, &c., Asse., L. R., 1900, 2d Q. B. D., 556.

and affirmed in the Court of Appeals, L. R., 1901, 1 Q. B. D., 123.

Both below and on appeal the decision holding that the succession tax was payable was put directly on the ground that there were English trustees holding the property and thus the property was owned by Englishmen and passed by the law of England.

The doctrine of Thomson *vs.* Advocate-General is fully recognized and the case decided on the doctrine of English settlements.

Clearly then it is the law of England, that where a legacy taxing statute is phrased in general terms and does not directly state that personal property of one domiciled abroad, found in England, shall be subject to the tax, such personal property of one domiciled abroad is not subject to the tax.

Whether the doctrine of the English Courts in respect to a succession tax be sound is not here important, as the case presents no facts to raise such questions and there is here no succession tax applicable to personal property.

Coming now to the decisions of the Federal Courts.

The case of U. S. *v.* Hunnewell, 13 Fed. Reporter, 617-618, decided by the U. S. Circuit Court in Massachusetts in 1882, arose under the United States statute of 1864, the language of which, in § 124, is for all purposes here concerned identical with the language of section 29 of the act of 1898.

The case was heard by Gray & Lowell, J. J., and the opinion given by Gray J., then and now an Associate Justice of this Court.

The direct and only points decided were two: 1. That alien personal property found here did not "pass" by the instestate laws of any State or Territory, but by the law of the domicile of the alien. 2d. That the U. S. Statute of 1864 "does not make the duty payable when the person possessed of such property dies testate if it would not be payable if such person died intestate."

The case of U. S. *vs.* Morris, 27 Fed. Rep., 341, decided in 1886, was a case precisely similar to the Hunnewell case, and in an opinion of six lines was decided by Butler, J., in the same way.

The case of Matter of Enston, 113 N. York, 174, decided in 1889, deserves attention.

The statute in question in that case read as follows: "After the passage of this act all property which shall pass by will or the intestate laws of the State from any person who may die seized or possessed of the same, while being a resident of the State, *or which property shall be within this State*, or any part of such property or any interest therein or income therefrom transferred by deed" * * * to take effect in enjoyment after death.

The words "or which property shall be within this State" were held to apply to gifts *inter vivos* to take effect in enjoyment after death and not to the preceding part of the statute covering property passing by will or intestate laws according to the rule of construction contended for in our first point; see especially p. 178, *et seq.*

It would not have required any great judicial effort to construe those words as applying to legacies or distributive shares and yet the New York Court of Appeals construed the act as not covering the case of the will of one domiciled in another State.

All these decisions were made after the repeal of the Act of 1864 and before the enactment of the Act of 1898.

Since the Act of 1898 the case of Ruckgaber *vs.* Moore, Collector, 104 Fed. Rep., 947, has been decided in accord with our contention. The opinion of Thomas, District Judge, is exhaustive.

In addition to all the foregoing we have the fact that in his annual report for 1900 the Commissioner for Internal Revenue recommended to Congress that section 29 of the Act of 1898 be amended by inserting after the word "otherwise" the words "including persons residing abroad" and by inserting

in section 30 after the words "shall pay to the collector or deputy collector of the district in which the deceased person was a resident," the words "or in which the property was located in case of non-residents."

These amendments if made would make the statute plain in favor of the contention of the Government. They were advised by the Commissioner, after the question had been raised, for he says that his office "had ruled on the law as it stands that the tax accrued but that it would be preferable to have the law specifically so declare as it has been contended otherwise" See Secretary of the Treasury Annual Report of 1900, p. 617.

In the session of Congress at which this report was submitted, the Act of 1898 was amended in other particulars suggested by the Commissioner, but not in any way affecting the above question and not as requested by the Commissioner in his report.

We submit that this action and non-action makes it clear beyond question that Congress was content with the judicial construction given to the old act and intended that the Act of 1898 should be similarly construed.

Fourth.—But we are not compelled to rely merely upon the decisions of the English and American Courts, which show that the general terms employed in that part of the statute which imposes the tax, do not apply to foreign personal estates, because the act now under consideration contains numerous provisions showing affirmatively that it was not the intention of Congress to impose a duty upon the passing of legacies or distributive shares arising out of the personal property of alien non-resident decedents; and in this respect it differs from the English and New York statutes to which we have referred. The whole structure of the statute shows that its sole pur-

pose was to impose the duty on legacies and shares arising out of the estates of resident decedents, and it imposes that duty no matter whether the personal property is actually situated here or abroad.

The language of the first clause of the act already referred to expressly confines the duty to distributive shares passing "by the intestate laws of any State or Territory," and we think no argument is necessary to show that Mr. Justice Gray was correct when he said in the Hunnewell case that the duty is not payable "when the person possessed of such property dies testate, if it would not be payable if such person died intestate."

Under the act the administrator or executor "before payment and distribution to the legatees or any parties entitled to beneficial interests therein shall pay to the Collector or Deputy Collector of the district in which the deceased person was a resident, the amount of the duty or tax assessed upon such legacies or distributive shares," and it also provides that he shall make and render "to the said Collector or Deputy Collector, a schedule, list or statement in duplicate of the amount of such legacy or distributive share, together with the amount of duty which has accrued or shall accrue thereon, verified by his oath or affirmation * * * which schedule, list or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest." The ancillary administrator of a foreign estate cannot make and verify this report. He does not make distribution to the legatees or to anyone entitled to a beneficial interest, and he has no means of ascertaining the "clear value of such interest." No attempt was made in this case to ascertain the clear value of the interests of the legatee and distributee of Elizalde, but the Collector imposed the duty upon the whole value of the

property found in this country, without reference to the costs of administration or the indebtedness of the estate in Spain or France. This unjust method must be adopted in every case, if the act applies to estates of alien non-resident decedents, because the ancillary administrator does not make a final settlement of the estate, but simply turns over the amount in his hands to the principal administrator or executor abroad, who alone can ascertain and verify the clear value of each interest.

It will be observed also from the quotation we have made from the statute that no provision whatever is made for the assessment or collection of the duty in such a case as the present, but that on the contrary, the authority of each of the several collecting officers is expressly limited to cases where the decedent was at the time of his death, a resident of the collection district in the United States for which such officer is appointed.

In the same section from which we have quoted (Sec. 30), it is provided that the Collector or Deputy Collector shall execute a receipt, or receipts, for the duty when paid, and that "such receipt, or receipts, duly signed and delivered * * * shall be sufficient evidence to entitle such executor, administrator or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators."

We submit that these provisions of the stattue are wholly inconsistent with the theory that legacies and distributive shares arising out of personal property left by a non-resident alien decedent, are subject to the duty, and that the whole amount collected in this case must be returned.

Fifth.—That Congress, by enacting the law of

1898, in the precise words of the law of 1864, meant and intended to adopt the construction which the Courts had given to the law of 1864, and which the English courts had given to a similar English law would seem plain.

With knowledge of such decisions, which surely must be imputed, the enacting of a new law in the words of the old, but intending a different meaning, would be unthinkable folly, of which we submit that this Court would not be justified in assuming that Congress could be guilty.

In the case of *Interstate Commerce Commission* vs. *B. & O. R. R. Co.*, 145 U. S., 263, this Court had occasion to construe the third section of the Interstate Commerce Act (24 Stat., 379, C. 104). Mr. Justice BROWN, in delivering the opinion of the Court, says, at page 282:

> "The English Traffic Act of 1854 contains a clause similar to Section 3 of the Interstate Commerce Act, that 'no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'"

The Court then cites several English cases construing the Traffic Act, and continues at page 284:

> "These traffic acts do not appear to be as comprehensive as our own and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. *But so far as relates to the question of* "*undue preference*," it may be presumed that Congress, in adopting the language of the

English act, had in mind the constructions given to these words by the English courts and intended to incorporate them into the statute (*McDonald* vs. *Hovey*, 110 U. S., 619)."

In the case last cited this Court says:

"It is a received canon of construction, acquiesced in by this Court,

"That where English statutes, such for instance as the Statute of Frauds and the Statute of Limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority" (Pennock *vs.* Dialogue, 2 Pet. 1, 18; Smith's Commentaries on Stat. & Const. Law, § 634; Sedgwick on Construction of Stat. and Const. Law, 363)."

McDonald vs. *Hovey*, 110 U. S., 619, at 628.

The authorities on this point are reviewed in the following note to the report of the case of *Ryalls* vs. *Mechanics Mills*, 5 L. R. A., 667, in which case the Supreme Judicial Court of Massachusetts, in construing an employer's liability act passed by the State Legislature—which was a substantial copy of the English Employers' Liability Act—adopted the construction given to that act by the English Courts. The note is as follows:

"Where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the Legislature of the same State or country, or by that of another, that construction is to be given to the later statute (Com. *vs.* Hartnett, 3 Gray, 450; Ruckmaboye *vs.* Mattichund, 32 Eng. L. & Eq., 84; Bogardus *vs.* Trinity Church, 4 Sandf.

Ch., 633; Rigg *vs.* Wilton, 13 Ill., 15; Adams *vs.* Field, 21 Vt., 256).

"It is to be presumed in such case that the Legislature who passed the later statute knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law" (Potter's Dwarris Statutes, 274).

Sixth.—The legal principle established by these cases is that personal property which had belonged to one deceased *is actually* situated in the place where the deceased was domiciled at the time of his decease.

True, the actual situation of the personal property may be different; but for all legal purposes, and especially with respect to tax laws and succession laws, it is conclusively presumed to be situated in the place of the domicile of the deceased and passes according to the law of such domicile.

This quite truly is said to be a legal fiction; but as was said by ANDREWS, J., in the Enston case, 113 N. York, 181, "it is a fiction which must prevail unless there is something in the policy of the statute or its language which shows a different legislative intent."

But it is claimed that this foreign law operates only by virtue of comity, and in the State of New York by statute, and that the true aspect is that the law of this State, comity or statute, provides that the property shall pass according to the foreign law.

Such is not the fact.

The general, and we may say universal, rule—the law common to all nations—is that personalty follows the person, and that the sovereignty having jurisdiction over the person has jurisdiction over

his goods. It is a rule of disclaimer of the Government where the goods and not the person are found, and it is a rule of assertion where the person is domiciled though the goods are elsewhere.

That the rule is founded on a fiction is true, but the very fact of the fiction shows that, in the conflict of laws, the fiction is resorted to in order to establish the sovereignty of the domicile over all goods wherever situated, and the disclaimer of sovereignty by all sovereigns where goods of one domiciled elsewhere are found. The *fiction* is that the property is *actually situated* at the domicile and *is not* anywhere else.

In other words, it is the law of the country where goods are found belonging to one domiciled elsewhere, not that the goods shall pass according to the law of the domicile, but that such goods are subject only to the sovereignty of the domicile; that the law governing them is the law of the domicile, on the fiction that such goods *are actually there situated*.

If it were the law of this country that applied there would be no need of the fiction. It is because we accept and concede to the fiction that we concede the domicile sovereignty.

Of course, any sovereignty can make another law. Within its territorial limits it is absolute, and as to all things therein situate it can provide as it pleases. When, however, it provides by statute in accord with the fiction, the statute is declaratory only, and makes no new law; and when it provides in opposition to the fiction it claims and asserts a new sovereignty or jurisdiction and enacts a new law.

It is believed that in all cases where a succession tax has been intended to act in opposition to the fiction the fact has been stated in plain and unmistakable language.

In the Enston Case, 113 New York, 181, ANDREWS, J., said: "It is a general rule of law that such property attends the owner and has its *situs* at his domicile. It is true that that is a fiction of the

law, but it is a fiction which must prevail unless there is something in the policy of the statute or its language which shows a different legislative intent."

Pursuant to the rule so established that such property "*has its situs at his domicile*," the New York statute was amended so as to cover property actually found here, although the owner was domiciled elsewhere. And this prior to the enactment of the law of congress of 1898, enacting the legacy tax.

1 Dos Passos on Inheritance Tax Law, 2d Ed., pp. 426-442-3. So Laws of New Jersey, *Ib.*, 459, of Penn., *Ib.*, 467, of Mass., *Ib.*, p. 477, of Maine, p. 484, of Ohio, pp. 489 and 493, of Conn., *Ib.*, p. 498, of Maryland, p. 503, of California, *Ib.*, p. 510, of Illinois, *Ib.*, p. 518, provide in express terms that property found in their States is subject to the tax notwithstanding that the owner was domiciled elsewhere.

In the absence of some statute law enacting that the *situs* of personal property is *not* that of the domicile of its owner, and *is* that where it is actually found, the law which governs and controls it is unquestionably that of the owner's domicile, and in case of death it passes by that law, not because the law where it is found so holds, but because by fiction of law its *situs*, the place where it is, is conclusively presumed to be that of the domicile of its owner.

As we have seen, many States—indeed, we think that all which have passed a succession tax law—have provided in plain terms for taxing property found within their borders, whether that of residents or non-residents. The United States has not.

The doctrine has been most emphatically adjudged in the New York Court of Appeals in Cross *vs.* United States Trust Co., 131 N. Y., 330. On pages 339-341 the Court says: "It is a general and universal rule that personal property has no local-

ity. It is subject to the law of the owner's domicile as well in respect to a disposition of it by act *inter vivos* as to its transmission by last will and testament and by succession upon the owner dying intestate." * * *

Should our Legislature deem it for the public good to repeal the statute relating to wills and to provide that all property should, upon the death of the owner, pass under the laws of intestacy, a disposition by will of personal property actually within the territory of the State, but owned by a person domiciled in another State, would still be valid, provided it was valid by the law which governed the owner."

In view of the general principle of law that the *situs* of personal property is that of its owner's domicile; in view of the statutes of the several States; in view of the unbroken line of decisions as to the construction of statutes not containing the express provisions for taxing property of non-residents, we submit that it is impossible to adopt the forced construction claimed by the government that this property passed under the law of any State or Territory of the United States.

Seventh.—There is no equitable, economic or legal principle because of which the contention of the Government should be sustained.

The State laws taxing personal property where found should not be followed. They are unwise and barbarous, and ultimately, whenever tax laws are enacted with any reference to economic or moral laws, will be repealed.

Assuming that the laws of two States or two countries are alike, and that each taxes the whole estate of one dying domiciled therein, and also all property found within its borders, though belonging to one domiciled in the other, it must follow

that the property found in one State of a person domiciled in the other is taxed in *both* States—*i. e.*, is doubly taxed, or is the object of double taxation.

That such double taxation is an evil and a wrong would seem plain.

All taxes are assessed on some person, and, although by reason of their being assessed in respect to or by reason of property owned by the person, we have contracted the habit of speaking of assessing or taxing the property, yet the least reflection satisfies us that the tax is on the person, in respect to the property, and not on the property.

That a person should be taxed in two States at the same time in respect to the same property, shocks the conscience. Even Judge VANN, who leads the judicial world in the effort to subject every man to the payment of every tax, and, apparently, regards the payment of taxes as the chief end of man, deprecates double taxation, and, in his dissenting opinion in *Matter of Bronson*, on page 24 of 150 New York, while he says that "double taxation is admitted to be an evil," attempts to justify it in a succession tax only as a punishment for the deceased owner having *probably* escaped taxation on personal property during his life.

If the learned Judge had been half as good an economist as he is lawyer he would know that no personal property in this or in, we think, any of the States, escapes taxation, except because of the absurd provision of law allowing the deduction of debts from the valuation of personal property and including choses in action, in the definition of personal property.

If the Union of the States means anything, it certainly should mean the adoption of such tax laws as would make impossible the taxing of the same person in respect to the same property by two

or more States at the same time; and the principle is the same as to two independent nations.

In a less civilized age and as a consequence of the grasping cupidity, once prevailing among nations as among men, one may imagine the prevalence of a rule such as that suggested on pages 30, 31, of 150 New York, to the effect that the *situs* should or should not be held to follow the person according as one or the other rule would make the person subject to tax. All such laws are, of course, subject to reprisals, and they must either become universally followed or universally abandoned.

Congress has shown a wise judgment in adhering to the old rule and in making no effort to subject an estate to the rank injustice of double taxation.

Its law reaches every domiciled resident and taxes him in respect to his personal property whatever its actual *situs*. The law of other countries does the same. The law of no country should go beyond that and try to reach personal property not owned by those domiciled in it.

Each nation should either

1. Follow the rule *mobilia sequuntur personam* and tax estates of those dying domiciled within its borders wherever situate and not tax estates within its borders where the owner dies domiciled abroad, or

2. Ignore the rule "*mobilia*, &c.," and tax only the estates found within its borders.

Either rule would avoid double taxation and perhaps either would be fair enough.

The two cannot possibly co-exist without double taxation and without a moral injustice which shocks the conscience.

We must remember in favor of the "*mobilia*" rule that if we do not tax the alien whose property is here we do tax our own citizens whose property is not here and that their property is not taxed in the sovereignty where it actually is.

The rule founded upon "*mobilia*, &c.," has the great advantage that it actually prevails in modern civilized nations (14 Howard, 424, last paragraph) and it is a rule which our States in their relations with each other must ultimately adopt unless we are to become the worst tax ridden community in the world. Not to adhere to it now in the United States Courts would be plain judicial legislation and of the most reactionary character.

It would be a return to the barbarous idea that stranger and enemy are synonymous and not to be considered in domestic legislation—it would be ignoring the friendship and amicable relations that do and should prevail not only among nations but among their peoples, and it would represent an indifference to moral standards as applying to our intercourse with those outside of our borders.

As to real estate, the *locus* rule has always prevailed. So far as we know, no political community has ever attempted to tax its citizens in respect to lands situated outside of its own borders. The moral injustice of such an attempt has always been recognized.

The adoption of the converse rule for personal property has been equally general.

It has remained for our respective States to first endeavor to tax personal property under both rules.

The legislation of the United States has not followed that of the States.

Surely the United States Courts should not overrule the definite policy of Congress.

The "*jus gentium*" of the civil law is not synonymous with the "Law of Nations" as this last phrase is commonly understood

"*Jus gentium*" means "the law common to all nations"

"Law of Nations" means the law prevailing between nations.

"*Jus gentium*" has the sanction of any and all municipal laws.

"Law of Nations" has no legal sanction, and is supported only by the sanction of public opinion and the ultimate sanction of force or war.

The meaning and sanctions of the "*jus gentium*" and of the "Law of Nations" are fully discussed and elaborated in Austen's "Province of Jurisprudence Determined," and we know of no writer on the subject who has differed with him.

Under the civil law it was thought that there were some principles of such plain and obvious justice and morality that every political organization enacted them into municipal law. Of such were the laws, "Thou shalt not kill; thou shalt not steal; he who breaks his contract shall pay the damages caused thereby," and many others.

Is it not obvious that the condition of mankind would be greatly benefited by the greatest extension of the number of laws that are "common to all nations?"

The first result would be an almost infinite reduction of the causes of war, that worst scourge of the human race.

Here in this case is a brilliant opportunity for this Court, which is without a peer in the world, to lend the weight of its great name and prestige to aid the doctrine and to obtain the benefit of uniformity of law on a great subject throughout the world.

We know of no political community where the doctrine of "*mobilia sequuntur personam*" does not obtain. We know of no political community where it has been enacted that personal property of one domiciled elsewhere shall be taxed, save in some of the States of this Union. There may be such, but we dont know of them.

Can, however, this Court have a loftier or more beneficial function than to say that a law which is common to so many nations is also the law of this nation, and that it is well worthy the consideration of the several States of the Union

which have enacted otherwise to consider whether the rhythm of human progress, slow enough at the best, does not require them also to conform their laws on this subject to the "*jus gentium*"; the law common to the rest of the world?

It would be an emphatic note, struck here, but with the world in unison.

Eighth.—The questions should be answered in the negative.

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Of Counsel for Deft. in error below.

No. 287.

FILED
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Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Dec. 2, 1901.

No. 287.

FERDINAND EIDMAN, United States Collector of Internal Revenue for the Third District of New York,

Plaintiff in Error,

against

MIGUEL R. MARTINEZ, as Ancillary Administrator with the Will Annexed of Salvador Elizalde, deceased,

Defendant in Error.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR IN COURT BELOW.

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2901

INDEX.

	PAGE
Abbotsford, The, 98 U. S., 440	22
Adams Express Co. vs. Ohio, 166 U. S., 185, 224, 225	29
Alvany vs. Powell, 2 Jones Eq., 51	16
Arnold vs. Arnold, 2 M. & C., at 270	18
Bittinger's Appeal, 129 Pa. St., 338	28
Bristol vs. Washington County, 177 U. S., 133	29, 41
Clark, Matter of, 9 N. Y. Supp., 444	33
Coleman's Estate, Matter of, 159 Pa. St., 21	28
Commonwealth's Appeal, 10 Casey, 204	24
Cross vs. U. S. T. Co., 131 N. Y., 339, 340	32
Dammert vs. Osborn, 141 N. Y., 564–567	32
Ennis vs. Smith, 14 How., 400	38
Enston, Matter of, 113 N. Y., 174, 181	31, 33
Erwin, *Re*, 1 Cromp. & Jery., 156	38
Fitch, Matter of, 160 N. Y., 92	32
Gurr vs. Scudds, 11 Exchequer, 191	12
Knowlton vs. Moore, 178 U. S., 41	3, 9, 10, 12, 13
Miller vs. Commonwealth, 111 Pa. St., 321	28
Minor vs. Merchants' Bank, 1 Pet., 46	22
McKeen vs. DeLancey's Lessees, 5 Cranch, 22	
Walter Orcutt's Appeal, 97 Pa. St., 179	24
Peabody vs. Stark, 16 Wall., 240	
Parsons vs. Lyman, 20 N. Y., 103	32
Prout, In Matter of, 128 N. Y., 74	33
Pullman Palace Car Co. vs. Penna., 141 U. S., 18, 22	29
Romaine, Matter of, 127 N. Y., 80	34
Ruckgaber vs. Moore, 104 Fed. Rep., 947	39
Scholey vs. Rew, 23 Wall., 331	14

PAGE

Small's Estate, 151 Pa. St., 1 28
State vs. St. Louis County Court, 47 Mo., 594 ... 16
Schluter vs. Bowery Savings Bank, 117 N. Y., 125, 129 33
Strode vs. Comm., 2 P. F. Smith, 181 24
Thomson vs. Advocate-General, 12 Clark & Finelly, 1 .....16, 19, 22, 39
Tulane, Matter of, 51 Hun, 213 33
Treat vs. White, 181 U. S., 264 12
United States vs. Morris, 27 Fed. Rep., 341 17
United States vs. Isham, 17 Wall., 496–512 12
United States vs. Hunnewell, 13 Fed. Rep., 617 .. 15
Wallace vs. Attorney-General, L. R., 1 Ch. Ap., 1–7 .....20, 39

TEXT BOOKS.

Dos Passos Inh. Tax Laws 23
Dicey on Conflict of Laws, 683, 684 38
Dowell History of Taxation 11
Hanson's Death Duties, page 391 *et seq.* 18–19
Kent's Commentaries, Vol. 2, p. 429 36
Story on Conflict of Laws, §§ 37, 376–381 37
1 Williams on Executors, 300, 310 38
2 " " " 1387 38

STATE STATUTES.

New Jersey Inheritance Tax Law 23
Pennsylvania " " " of 1887 23
" " " " of 1826 23
Massachusetts " " " 23
Maine " " " 23
Ohio " " " 23
Connecticut " " " 23
Maryland " " " 23
California " " " 23
New York " " " 23
Illinois " " " 23

PAGE

New York Collateral Inheritance Tax, Acts of 1885, 1887 ..... 25, 26, 33–34
New York Transfer Tax Law, 1892, 1896 ..... 24, 25
ACTS OF CONGRESS of July 1, 1862, 12 Stat. 433 ... 13
" " " " June 30, 1864, 13 Stat., 223, 285 13
" " " " June 30, 1864, construed by Commissioner of Int. Rev. 15
" " " " June 13, 1898, quoted 3–8

ENGLISH STATUTES.

36 Geo. III., C. 52, Legacy Duty Act 18
16–17 Vict., C. 51, Succession Duty Act 20

Supreme Court of the United States.

OCTOBER TERM, 1901.

FERDINAND EIDMAN, United States Collector of Internal Revenue for the Third District of New York,
Plaintiff in Error,

AGAINST

MIGUEL R. MARTINEZ, as Ancillary Administrator with the Will Annexed of Salvador Elizalde, deceased,
Defendant in Error.

No. 287.

On Certificate from the United States Circuit Court of Appeals for the Second Circuit.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR IN COURT BELOW.

The questions of law certified by the Circuit Court of Appeals are as follows:

> "1. Is any tax imposed by the 29th and 30th sections of the Act of Congress of June 13, 1898, entitled 'An Act to provide ways and means to meet war expenditures and for other purposes,' upon the passing of any legacy arising out of the personal property of a non-resident alien who has never resided or had a domicile within the United States and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicile pursuant to the laws thereof by

which he gives all his property to a non-resident alien legatee, and who leaves certain personal property within the State of New York exceeding $10,000 in value?

"2. Is any tax or duty imposed by the 29th and 30th sections of the Act of Congress of June 13th, 1898, entitled "An Act to provide ways and means to meet war expenditures and for other purposes" upon the passing of any distributive share arising out of the personal property of a non-resident alien who has never resided or had a domicile within the United States and who dies without the United States in the year 1899 intestate, and by the law of his foreign domicile all of his personal property passes to his son, also a non-resident alien, and who leaves certain personal property within the State of New York exceeding $10,000 in value?"

See Record, p. 2.

We do not claim that Congress has no power to tax the property of non-resident alien decedents. Our contention is that the duty provided for by the statute under discussion is not a tax upon the property of decedents, but upon the passing of a legacy by will to a legatee, and upon the passing of a distributive share to the person entitled thereto by the intestate laws of a State or Territory; that Congress did not intend to impose, and did not impose, any tax upon the passing of the property of non-resident alien decedents, whether testate or intestate; that whatever legacies and distributive shares pass to the legatee and distributee of an alien decedent, he receives in a foreign jurisdiction by virtue of the laws of the decedent's domicile, and after the duties and other charges imposed thereon by foreign laws have been deducted; and that, therefore, the ancillary administrator here did not hold any legacies or distributive shares subject to taxation under the act.

FIRST.

THE TAX IMPOSED BY THE 29TH AND 30TH SECTIONS OF THE ACT OF CONGRESS OF JUNE 13TH, 1898, ENTITLED "AN ACT TO PROVIDE WAYS AND MEANS TO MEET WAR EXPENDITURES AND FOR OTHER PURPOSES," IS NOT A TAX UPON THE PASSING OF THE ESTATE OF THE DECEDENT BUT UPON THE PASSING OF A LEGACY TO A LEGATEE BY A WILL OR OF A DISTRIBUTIVE SHARE TO A PERSON ENTITLED THERETO BY THE INTESTATE LAWS OF A STATE OR TERRITORY.

(a) This is a legacy tax as distinguished from a probate or estate or succession duty.

At the outset it is necessary to determine the exact subject matter upon which a tax or duty is imposed by this act as construed by this Court in the case of *Knowlton vs. Moore*, 178 U. S., 41.

We quote the act with the matter added in Section 29 to Section 124 of the Act of 1864 in **black letter,** matter omitted therefrom in *italics*, bracketed, and the portions of the act to which we shall have particular occasion to refer in SMALL CAPITALS. Section 30 is identical with Section 125 of the Act of 1864 except that the word "collector" is substituted for the word "assessor."

"ACT OF JUNE 13TH, 1898, 30 STAT., 448, 464.

"LEGACIES AND DISTRIBUTIVE SHARES OF PERSONAL PROPERTY.

"SEC. 29. That any person or persons having in charge or trust, as administrators, executors or trustees, ANY LEGACIES OR DISTRIBUTIVE SHARES arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of **ten thousand** [*one thousand*]

dollars in actual value, PASSING, after the passage of this act, FROM ANY PERSON POSSESSED OF SUCH PROPERTY, EITHER BY WILL OR BY THE INTESTATE LAWS OF ANY STATE OR TERRITORY, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States, as follows—that is to say: **Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:**

"FIRST. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister to the person who died possessed of such property as aforesaid, at the rate of **seventy-five cents** [*one dollar*] for each and every hundred dollars OF THE CLEAR VALUE OF SUCH INTEREST IN SUCH PROPERTY.

"SECOND. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of **one dollar and fifty cents** [*two dollars*] for each and every hundred dollars OF THE CLEAR VALUE OF SUCH INTEREST.

"THIRD. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of **three** [*four*] dollars for each and every hundred dollars OF THE CLEAR VALUE OF SUCH INTEREST.

"FOURTH. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of **four** [*five*] dollars for each and every hundred dollars OF THE CLEAR VALUE OF SUCH INTEREST.

"FIFTH. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the rate of **five** [*six*] dollars for each and every hundred dollars OF THE CLEAR VALUE OF SUCH INTEREST:

"*Provided*, THAT ALL LEGACIES OR PROPERTY PASSING BY WILL, OR BY THE LAWS OF ANY STATE OR TERRITORY, TO HUSBAND OR WIFE of the person died possessed, as aforesaid, shall be exempt from tax or duty.

"**Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or**

value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three."

"SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the PROPERTY OF EVERY PERSON WHO MAY DIE AS AFORESAID for twenty years, or until the same shall within that period be fully paid to and discharged by the United States; and EVERY EXECUTOR, ADMINISTRATOR OR TRUSTEE BEFORE PAYMENT AND DISTRIBUTION TO THE LEGATEES OR ANY PARTIES ENTITLED TO BENEFICIAL INTEREST therein, SHALL PAY TO THE COLLECTOR OR DEPUTY COLLECTOR OF THE DISTRICT OF WHICH THE DECEASED PERSON WAS A RESIDENT, the AMOUNT OF THE DUTY OR TAX ASSESSSED UPON SUCH LEGACY OR DISTRIBUTIVE SHARE, and shall also make and render to the said collector or deputy collector a schedule, list or statement in duplicate, of THE AMOUNT OF SUCH LEGACY OR DISTRIBUTIVE SHARE, together with the amount of duty which has accrued, or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officers having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list or statement shall contain THE NAMES OF EACH AND EVERY PERSON ENTITLED TO ANY BENEFICIAL INTEREST THEREIN, TOGETHER WITH THE CLEAR VALUE OF SUCH INTEREST, the duplicate of which schedule, list or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector,

shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by EVERY TRIBUNAL WHICH, BY THE LAWS OF ANY STATE OR TERRITORY, IS, OR MAY BE, EMPOWERED TO DECIDE UPON AND SETTLE THE ACCOUNTS OF EXECUTORS AND ADMINISTRATORS. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the CLEAR VALUE OF SUCH BENEFICIAL INTEREST, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court,

and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge or custody any record, file or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge or custody any such records, files or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of $500: *Provided*, That in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be *prima facie* evidence of its truth, and that the requirements of the law had been complied with by the officers of the Government."

In the *Knowlton* case this Court had occasion to discuss in great detail the general topic of inheritance taxes and to review their history in this country and in England.

It was claimed by the plaintiffs in error, in support of the proposition that the tax was unconstitutional, that the liability to the tax was determined by the value of the entire personal estate of the decedent, or, if not, then the progressive rate on each legacy or share was determined by the value of the whole personal estate. In discussing this point the Court says at page 65:

> "The opening words of Section 29 may, for clearness, be thus arranged:
>
> "That any person or persons having in charge "or trust as administrators, executors or trustees "any legacies or distributive shares arising from "personal property, * * * passing, after the "passage of this act, from any person possessed "of such property, either by will or by the intes- "tate laws of any State or Territory, * * * "shall be, and hereby are, made subject to a duty "or tax to be paid to the United States as follows, "that is to say," etc.
>
> "Thus collocated *the statute clearly imposes the "duty on the particular legacies or distributive "shares, and not on the whole personal estate. It "does not say that the tax is levied on the personal "estate left by the deceased person, but it is imposed "on legacies or distributive shares arising from "such property.*"

At page 64 the Court says:

> "*The tax is on the passing of legacies or distributive shares of personalty* with a progressive rate on each separately determined by the sum of each of such legacies or distributive shares."

And at page 78, referring to this construction, the Court says :

> " Its correctness is at once apparent when the " other views are disposed of. As the ' whole " amount of such personal property as aforesaid ' " relates to the sum of each legacy or distributive " share considered separately, it follows that all " legacies not exceeding ten thousand dollars are " not taxed, and that those above that amount are " taxed primarily by the degree of relationship or " absence thereof, specified in the five classifica- " tions contained in the statute, and that the rate " of tax is progressively increased by the amount " of each separate legacy or distributive share."

(b) This duty, therefore, is imposed upon the right or privilege of the legatee or distributee of succession to the legacy or share by virtue of a will or of the intestate laws of a State or Territory, as distinguished from the right or privilege of the owner of the estate to dispose of it by will or to have it pass under the intestate laws.

Under the construction given to the act by this Court in the *Knowlton* case, it is quite immaterial how large an estate is left by the decedent. Whatever its value, no tax accrues unless the estate passes by a will or under the intestate laws of a State or Territory to beneficiaries other than the husband or wife of the decedent in one or more legacies or shares of over $10,000 in value. The rate and amount of duty are determined primarily by the relationship of the beneficiary to the decedent, and secondarily by the value of the legacy or share, and the duty when paid is to be deducted from or charged against not the entire estate, but each legacy or share upon the passing of which it is assessed.

The intestate, for example, who dies possessed of personal property worth $50,000, and leaves a widow entitled to one-half his estate and three children entitled each to one-sixth, enjoys no greater or less priv-

ilege of disposition than another intestate who dies possessed of the same amount of personal property, leaving a widow entitled to one-half and one child entitled to the other half. Yet, in the first instance, no tax accrues, in the second a tax of three-quarters of one per cent accrues on the passing of the distributive share to the child. A testator bequeaths fifty legacies of $10,000 each to strangers in blood and no tax accrues; another testator bequeaths $500,000 to his adopted child and a tax of $50,000 accrues on the passing of that legacy. The schedule which the executor is required by Section 30 to render to the collector is to contain a statement of the value of each legacy or share, and the tax is to be paid, not when letters are taken out, but before payment or distribution to the legatee or distributee. The act regards only the beneficial interest of the legatee or distributee and not the right, privilege or property of the decedent.

Dowell, in his History of Taxation (London, 1884), Vol. III., p. 138, classifies death duties as follows:

> "SECTION I. The probate, administration and "inventory duties.
>
> "SECTION II. The Legacy and Succession "Duties. * * * There is not any connection "between the taxes comprised in Section I. and "those under Section II. The history of the "taxes is distinct."

SECOND.

IT MUST BE CONCLUSIVELY PRESUMED THAT CONGRESS DID NOT INTEND TO IMPOSE ANY DUTY UPON THE PASSING OF LEGACIES UNDER THE WILLS OF NON-RESIDENT TESTATORS OR OF DISTRIBUTIVE SHARES OF THE ESTATES OF NON-RESIDENT INTESTATES.

(a) The only question to be considered is as to the proper construction of the language of the statute.

We insist that in this case the true question is not, as argued in behalf of the Government, whether the property of non-residents is to be declared exempt from the general terms of the act, but whether Martinez, the ancillary administrator, had in charge or trust any legacies passing by will, or any distributive share passing by the intestate laws of New York, within the meaning of the language of the act.

The statute should be construed strictly in favor of the taxpayer.

In our former brief, at pages 5-8, we cited a large number of cases on this point, which we need not repeat, but we would add to them the following extract from the opinion of this Court by Mr. Justice BREWER in *Treat vs. White*, 181 U. S., 264 :

> "It is also true, as said by this Court in *United States vs. Isham*, 17 Wall., 496, 504, 'if there is a doubt as to the liability of an instrument to taxation, the construction is in favor af the exemption, because in the language of POLLOCK, C. B., in *Gurr vs. Scudds*, 11 Exchequer, 191, a tax cannot be imposed without clear and express words for that purpose. With that proposition we fully agree. There must be certainty as to the meaning and scope of language imposing any tax, and any doubt in respect to its meaning is to be resolved in favor of the taxpayer.' "

(b) The 29th and 30th Sections of the War Revenue Law of 1898 are a substantial re-enactment of the corresponding sections of the Acts of 1862 and 1864, and they were based upon the English Legacy Duty Act of 1796.

We have already quoted the Act of 1898, showing its substantial identity with the Act of 1864. The substantial identity of the two acts and the close similarity of the Act of 1864 to the English Act of 1796 are fully discussed in the *Knowlton* case. On this point it is sufficient to quote the following extracts from the very able and exhaustive opinion of Mr. Justice WHITE:

> " In sections 111 and 112 of chapter 119, act of July 1, 1862 (12 Stat., 433, 485), a legacy tax was again enacted. Like in character to the act of 1797, this was a tax imposed on legacies or distributive shares of personal property. But in the same chapter was contained still another form of death duty. By section 194 a probate duty, proportioned to the amount of the estate, and to be paid by way of stamps, was levied. The result of the act of 1862, therefore, *was to cause the death duties imposed by Congress to greatly resemble those then existing in England; that is, first, a legacy tax, chargeable against each legacy or distributive share, and a probate duty, chargeable against the mass of the estate. The only difference between the system created by the act of 1862, and that existing in England was that the act of 1862 did not embody the succession tax provided for in England, by which interests in real estate, passing by death, were subject to a duty. . . . . The act of 1864, however, added, in separate sections, a duty on the passing of real estate, in substantial harmony with the principle of the succession tax expressed in the English Succession Duty Act. Thus it came to pass that the system of death duties prevailing in England and that adopted by Congress—*

leaving out of view the differences in rates and the administrative provisions—*were substantially identical, and of a three-fold nature; that is, a probate duty charged upon the whole estate, a legacy duty charged upon each legacy, or distributive share, of personalty, and a succession duty charged against each interest in real property.* * * *

"Whilst the general plan of the act of 1864 shows that its framers had in mind the English law, *this fact was conclusively demonstrated by Section 127, wherein the succession, or real estate inheritance, tax was defined in substantially similar terms to that contained in the English Succession Duty Act.* The identity of the conception embodied in the act of 1864, with that existing in England, was observed by this Court in Scholey vs. Rew, 23 Wall., 331, where in holding that the subject matter of the assessment of a succession tax was the devolution of the estate, or the right to become beneficially entitled to the same, etc., the Court said (p. 349):

"'Decided support to the proposition that such is the true theory of the act is derived from the fact that *the act of Parliament from which the particular provision under discussion was largely borrowed has received substantially the same construction.*'"

Knowlton vs. Moore, 178 U. S., 51, 52.

It is to be noted that the probate and succession duties embodied in the Act of 1864, referred to by Mr. Justice WHITE, *which included the estates, personal and real, of non-resident decedents*, were not re-enacted in 1898.

(c) Under the administrative and judicial construction of the Legacy Duty Act of 1864 no tax accrued on the passing of the property of non-resident decedents.

ADMINISTRATIVE CONSTRUCTION.

On November 23d, 1867, the following official decision was made and published by the Commissioner of Internal Revenue for the information and guidance of all concerned.

"SUCCESSION AND LEGACY.

"U. S. Legatees and Successors of Foreign Testator or Intestate.

"Unless the testator or intestate who dies in a foreign country has a residence in the United States his legatees in this country are not subject to the legacy tax. But persons succeeding to real estate situate in the United States are liable to the succession tax, without reference to the place of residence of the devisor or predecessor."

6 Int. Rev. Record, p. 179, 1st column.

This ruling remained in force, so far as we have been able to ascertain, for some thirteen years, and until after the repeal of the act. It was never questioned, and no attempt was made by the Government to enforce payment of the tax on the part of those interested in the personal estates of non-residents until Commissioner *Raum* in the year 1882 had a test suit brought in Massachusetts.

JUDICIAL CONSTRUCTION.

The suit referred to, under which the Act of 1864 was finally and judicially construed, is reported as *United States vs. Hunnewell*, 13 Fed. Rep., 617. This case is cited in our former brief at page 13, but not at length. It is so important a decision in our favor that we shall refer to it fully.

The facts were essentially the same as in the case at bar. The decedent was a resident of France; her will

was executed in conformity with the laws of France, and was proved there, and by its terms her property was given to her son, who was also a resident of France. The personal property situated in the district of Massachusetts represented only a small part of the decedent's estate. The cause was heard in 1882 before Justices HORACE GRAY and LOWELL. The former, then as now an Associate Justice of this Court, wrote the opinion, in the course of which he said :

> " The cases cited at the bar exhibit some difference of opinion upon similar questions. In Great Britain it has been determined upon much consideration by the highest authority that an act of parliament imposing a legacy duty does not apply to property of a person whose domicile at the time of his death is not within the realm (Thomson vs. Advo. Gen., 12 Clark & F., 1 ; s. c., 4 Bell, 1). In the courts of North Carolina and of Missouri, on the other hand, it has been held that all personal property within the state is liable to such a duty, whether the owner's domicile at the time of his death is within or without the state (Alvany vs. Powell, 2 Jones Eq., 51 ; State vs. St. Louis County Court, 47 Mo., 594).
>
> " But Congress, in the Act of 1864, *has made its intention clear that the legacy duty should be payable on the estates of those persons only whose domicile at the time of their death is within the United States.* Section 124 imposes a duty on legacies or distributive shares arising from personal property ' passing from any person possessed of such property, either by will or by the intestate laws of any state or territory ; ' *it does not make the duty payable when ' the person possessed of such property ' dies testate, if it would not be payable if such person died intestate ;* and, if Madame de la Valette had died intestate, her son would not have taken a distributive share ' *by the intestate laws of*

any state or territory,' but, if at all, by the law of France, the domicile of his mother at the time of her death. And section 125, by requiring the executor or administrator to pay the amount of this duty 'to the Collector or Deputy Collector of the *District of which the deceased person was a resident,*' leads to the same conclusion."

We do not understand that, as the Solicitor-General claims, this case did not receive full consideration by the Court. It was a test case, involving large interests, and submitted on an agreed statement of facts. Under the terms of the Act of 1864, as under the present act, the tax, if leviable, was a lien on all the property of every non-resident who had died since 1864 for 20 years from his death, and, therefore, if the act had been held to apply to non-resident estates, the entire amount of taxes in arrears could have been sued for and collected. Apparently all the authorities then in existence were cited by counsel, and the decision was rendered by two eminent jurists after a full presentation of the case and careful consideration of the statute.

The Hunnewell case was cited and followed in *United States vs. Morris,* 27 Fed. Rep., 341, and has never been questioned as an authority until now.

(d) The English Courts, prior to the enactment of the Act of 1864, had, without exception, construed the English Legacy Duty Act of 1796 so as not to include legacies passing by the wills of non-residents, and in 1865 they gave the same construction to the Succession Duty Act of 1853. These constructions have been upheld by a long line of decisions up to the time of the passage of the Act of Congress of June 13th, 1898, now before this Court.

The English Legacy Duty Act, with a few changes in rate and administrative features, has been in force in England since 1780. The act in force in 1864 and

now in force was passed in 1796 (36 Geo. III., C. 52; *Hanson Death Duties*, p. 391 *et seq.*).

The enacting portion of this act, § 2, provides:

> "II. And be it further enacted, that, upon *every legacy* specific or pecuniary or of any other description of the amount or value of twenty pounds or more, *given by any will or testamentary instrument* of any person who shall die after the passing of this Act, *out of the personal estate* of the person so dying, and also upon the clear residue and upon every part of the clear residue of the personal estate * * * which shall remain after deducting debts, funeral expenses and other charges * * * *or upon intestacy*, there shall be raised, levied, collected and paid * * * the several duties, and after the rates and in manner following—that is to say, where any such legacy, or any residue or part of residue * * * shall be given or shall pass to or for the benefit of a brother or sister of the deceased, * * * there shall be charged a duty of two pounds for every one hundred pounds of the value of any such legacy," etc.

The construction of this act is thus referred to by *Hanson* in his treatise on death duties at page 423:

> "The personal estate intended by the act must evidently be such as is situate within this country, that being, to use the words of Lord COTTENHAM in *Arnold vs. Arnold* (2 M. & C., at 270) 'the limit of the sphere of the enactment,' and, as all personal property of a movable nature is considered to follow the person of the owner so as to be, in construction of law, situate at the place of his domicile, it is a necessary consequence that the domicile of the deceased testator or intestate at the time of his death, and not the actual local

situation of the property, is the proper test of its liability to duty.

"This doctrine was not, however, distinctly adopted to its full extent until the year 1845, when it was finally declared to be law by the decision of the House of Lords in *Thomson vs. Adv.-Gen.*, (13 Sim., 153, 12 Cl. & Fin. 1), * * * where it was distinctly settled, that the local situation of the property is an immaterial circumstance, and that the liability of personal estate to duty depends wholly upon the domicile of the owner at the time of his death, without reference to its actual locality. The testator in that case was a native of Scotland, but died domiciled in Demerara, leaving personal property in Scotland, and having left legacies to persons in that country. The Scotch Court of Exchequer, in the first instance, decided that legacy duty was payable, and the case was then carried to the House of Lords, who heard it with the assistance of the Judges, and eventually overruled the decision of the Court below. TINDAL, C. J., delivering the unanimous opinion of the Judges to the effect that no legacy duty was payable under such circumstances, observed :

"It is admitted in all the decided cases that "the very general words of the statute, 'every leg- "acy given by any will or testamentary instrument "of any person,' must of necessity receive *some* "limitation in their application ; for they cannot "in reason extend to every person everywhere "whether subjects of this Kingdom or foreigners, "and whether at the time of their death domiciled "within the realm or abroad ; and as your Lord- "ships' question applies only to legacies out of "personal estate, strictly and properly so called, "we think such necessary limitation is that *the* "*statute does not extend to the wills of persons at* "*the time of their decease domiciled out of Great*

" *Britain, whether the assets are locally situated* " *within England or out.*"

" And Lord LYNDHURST, C., in giving judgment, adopted this view and held that the circumstance that the testator's property was actually situate in this country at the time of his death did not make any difference. 'It was personal property, and, following the principle laid down in the case of *Ewin, it must be considered as property within the domicile of the testator* in Demerara ; and it is admitted that, if it was property within the domicile of the testator in Demerara, it cannot be subject to legacy duty (13 Sim., 161)' "

In 1853 Parliament passed the "Succession Duty Act," 16 and 17 Vict., C. 51, which included personal as well as real property, in which respect it differed from the succession duty in the Act of Congress of 1864. This act provided :

" II. Every past or future disposition of property, by reason whereof any person has or shall have become beneficially entitled to any property, or the income thereof, upon the death of any person, * * * shall be deemed to have conferred or to confer on the person entitled, by reason of any such disposition or devolution, a 'succession,'" etc., etc.

The act came before the Lord Chancellor and the Court of Appeals in Chancery in November, 1865, in the case of *Wallace vs. Attorney-General*, 1 Ch. Ap., 1. Lord CRANWORTH, in the course of his opinion, says (p. 5) :

" The question raised in the case of *Wallace vs. Attorney-General* is one of great importance, *whether succession duty is payable on legacies given by the will of a person domiciled in a foreign coun-*

try. The duty is claimed under the Succession Duty Act, 16 & 17 Vict., C. 51. * * *

" By the second section of the act every disposition of property by reason whereof *any person shall,* on the death of another *become entitled* to any property, shall be deemed to confer on the person *so becoming entitled* a succession, and on that succession a duty is imposed by Section 10.

" The question, therefore, is whether where a person domiciled abroad makes a will giving personal property in this country by way of legacy the legatee is a person becoming entitled to that property within the true intent and meaning of the 2d Section. I think not. I think that in order to be brought within that section *he must be a person who becomes entitled by virtue of the laws of this country. Any wider construction would give rise to difficulties hardly to be surmounted.* In collecting the duties the officers of the revenue will in general find no difficulty, supposing the duties to be imposed only on persons entitled under our own laws. * * * *But who the parties entitled under a foreign will are is a question which no knowledge of our laws will enable them to solve.* It can only be ascertained by evidence in every case showing what the foreign law is and who is entitled under it.

* * * * * *

" These are all difficulties on the surface and probably many more might be discovered by further investigation. The consideration of them has satisfied me that the only safe way of solving this question, as that relating to legacy duty, is to consider the duty as imposed only on those who claim title by virtue of our law. I must add that the silence of the Act on this point seems to me strongly to show that the intention of the Legislature was such as I have stated. The statute was passed only about eight years after the decision

of the House of Lords in Thomson v. Advocate-General, and when the non-liability to legacy duty of legatees under the wills of persons not domiciled in this country had been fully established after having for a long time previously given rise to much discussion. *I can hardly think that the Legislature intended by a side wind, as it were, and without any preamble indicating its intention, to do what, without exciting attention, would practically operate as a reversal of that which, after frequent discussions in the different courts, had established the rights of persons claiming as legatees under foreign wills.* * * * Parliament has, no doubt, the power of taxing the succession of foreigners to their personal property in this country; but I can hardly think that we ought to presume such an intention unless it is clearly stated."

(e) Congress, in re-enacting the Act of 1864, must be deemed to have adopted the administrative and judicial construction of that act and the construction of the English Legacy Duty Act by the English Courts.

In addition to the authorities cited on this point at pages 18, 19 and 20 of our former brief, we call the Court's attention to the following cases:

Minor vs. Merchant's Bank, 1 Pet., 46.
The Abbotsford vs. Johnson, 98 U. S., 440.

(f) Congress, by adopting the language of the Act of 1864 instead of the language of the State inheritance tax laws, declared its intention not to include the passing of the property of non-residents.

The Solicitor-General cites a number of decisions of the State courts and from them contends that Congress intended by this act to modify the *mobilia*, etc., rule. An examination of these cases and of the statutes thereby construed shows that in all these cases the acts under construction either expressly included

non-residents or expressly applied to all property within the State, in which respects they differ entirely from the Act of Congress under consideration.

The principal collateral inheritance tax statutes of the States referred to by the Solicitor-General will be found in Don Passos on Inheritance Tax Law (2d Ed.), as follows:

New Jersey, page 459; act passed May 15th, 1894, similar in form to New York Act of 1885 construed in the Enston case.

Pennsylvania, page 467; present act passed May 6th, 1887, provides that "all estates, real, personal and mixed, of every kind whatsoever, situated within this State, whether the person or persons dying seized thereof be domiciled within or out of this State."

Massachusetts, page 477; act passed in 1891 applies to "all property within the jurisdiction of the commonwealth, whether belonging to inhabitants of the commonwealth or not, and whether tangible or intangible."

Maine, page 484; act passed 1893, copied from Massachusetts act.

Ohio, page 489; act passed 1893, copied from Massachusetts act.

Connecticut, page 498; act passed 1889, same as Massachusetts act.

Maryland, page 503; act passed 1888 applies to "all estates, real, personal and mixed, being in this State."

California, page 510; act passed 1893 copied from New York Act of 1887 discussed in Romaine case below.

Illinois, page 518; act passed 1895 very similar to New York Act of 1887; same provision as to non-residents.

Pennsylvania Decisions.

The present Pennsylvania Act takes the place of the Act of 1826. That act as amended by the Act of 1850 (Pamph., pp. 170, 227) provides that "all estates, real,

personal or mixed, passing from any person * * * being within this Commonwealth, either by will *or under the intestate laws thereof* to any person other than to father, etc., shall be liable to a tax," etc. This act came before the Supreme Court of Pennsylvania in the case of *Orcutt's Appeal*, 59 Pa. St., 179, decided in 1881.

In that case the facts were almost identical with those in the case at bar. A citizen of New Jersey died, leaving personal property in New Jersey and a will executed in that State, where it was duly probated and letters testamentary therein issued. The testator also left certain United States bonds deposited with a trust company in Pennsylvania. Ancillary administration, *c. t. a.*, was taken out in that State, and the bonds disposed of by the ancillary administrator, who held the proceeds. The liability of the said bonds, or their proceeds, to said tax, was the question before the Court.

Mr. Justice STERRETT delivered the opinion of the Court, holding that the bonds were not subject to the tax. At page 185 he says:

> "As it is, however, the fund here is in the hands of a purely ancillary administrator, *whose sole function it was* to receive from the United States Treasury the amount called for by the bonds, *and transmit the same*, less costs and charges, *to the executrix in New Jersey for administration, according to the laws of that State and the directions of the testator.* * * *
>
> "The tax does not attach to the very articles of property of which the deceased died possessed. It is imposed only on what remains for distribution after expenses of administration, debts and rightful claims of third parties are paid. * * * It is on *the net succession* to the beneficiaries, and not on the securities in which the estate of the decedent was invested (Commonwealth's Appeal, 10 Casey, 204; Strode vs. Comm., 2

P. F. Smith, 181). How, then, is it possible to impose a tax on this fund when it has never been ascertained judicially how much or whether any of it will go to the collateral legatees? * * * The court of the testator's domicile is the only one that can properly determine how much of it will ultimately go to the collateral legatees.

"Again, the tax * * * is further restricted by defining the mode in which they shall pass—viz., estates being 'within this Commonwealth' and 'passing from any person,' etc., *either by will or under the intestate laws thereof.* It is clear, therefore, that estates *not passing by a will that is operative within the state or under the interstate laws* thereof * * * are not within the purview of the act."

The present Transfer Tax Law in New York:

The old Collateral Inheritance Tax Law of 1887 discussed in the *Romaine* case, cited hereafter, was repealed in 1892 by the enactment of the "Transfer Tax Act" (L. 1892, Ch. 399), which has in substance been codified as Article X. of the Tax Law, §§ 220–243, enacted in 1896.

That law provides (Tax Law, § 220):

"A tax shall be * * * imposed upon the transfer of any property, real or personal, of the value of $500 or over, or of any interest therein, or income therefrom, * * * to persons or corporations * * * in the following cases.

"1. When the transfer is by will or *by the intestate laws of this State* from any person dying seized or possessed of the property *while a resident* of the State.

"2. When the transfer is *by will or intestate law* of property within the State and the decedent

was a non-resident of the State at the time of his death.

"3. When the transfer is of property made by a resident or by a non-resident, when such non-resident's property is within this State, by deed, etc., made in contemplation of the death of the grantor, etc."

The Court will see that this act speaks of the passing of the property of a resident intestate "by the intestate laws of this state," and of the passing of the property of a non-resident intestate "by intestate law."

Evidently the Legislature by thus changing the language with respect to the passing of the property of a non-resident intestate meant to avoid any ambiguity which would have arisen had Section 2 read: "When the transfer is by the *intestate laws of this State* of property within the State and the decedent was a non-resident." In that case the real property of the non-resident which passes by the intestate laws of New York would have been taxed, while the personal property which under the decision in the *Romaine* case, cited below, does not pass by "the intestate laws" of New York, would have escaped.

It is preposterous to claim that the Act of Congress should be construed as if all these minute and detailed provisions of the New York act, framed to include property held not included in former acts by the Court of Appeals, had been expressly enacted by Congress.

All of the State inheritance tax laws above referred to were in force when Congress passed this Act of June 13th, 1898, all of them either mention non-residents by name or expressly include all property tangible or intangible within the State. They are all analogous to the English probate or estate duty rather than to the legacy duty, yet when Congress enacted this act it chose not the language of the State laws, but the language of the old Act of Congress of 1864, based on the English act of 1796, which had been construed by

the administrative department and by the Courts. There could not be a more clearly implied declaration of an intention not to include the property of non-residents.

(g) The administrative provisions of Section 30 of the act fail to provide any method for assessing or collecting the tax in the case of non-resident decedents.

The liability to the tax depends, as we have said, upon the amount of each legacy. The rate of tax is determined by two factors, the relationship of the beneficiary to the decedent and the value of the legacy or share, according to which value the rate is progressively increased. The tax is to be paid to the Collector of the district of which the decedent was a resident and before such payment the executor is to prepare a schedule showing the value of each legacy on which the tax is to be assessed. The tax is to be paid before payment or distribution of the legacy or share.

These provisions are wholly inapplicable to the case of property belonging to an alien decedent.

In the case at bar Elizalde left a personal estate of several millions in Spain, and the bonds found in New York amounted to $225,000. Suppose he had made bequests to strangers and collaterals some of $20,000, some of $100,000, some of $1,000,000 and such bequests had amounted to more than one-third of his estate, suppose, further, that in Spain he had left creditors to whom he was indebted in large amounts; suppose, also, that $125,000 had been in New York and $100,000 in Boston. In such a case and it is but supposing a case which is very likely to arise in relation to many non-resident estates, how would it be possible to compute the tax? In the case at bar the collector treated the $225,000 as one legacy passing to the son, but in the hypothetical case it would be impossible to say whether the property here was to pass as legacies or in the payment of debts, and if as legacies how much of it would be appropriated to the payment of any particular legacy. In endeavoring to

fix the tax the collector in New York and the collector in Boston would be confronted with a maze of legal technicalities involving among other things the marshalling of assets, the principle of *legitime* under the Spanish law the question as to which collector had jurisdiction, none of which matters would appear in the "schedule, list or statement." The collectors would have to proceed by the merest guesswork and an endless amount of litigation would ensue in the Federal Courts.

In such a case the ancillary administrator, who is the mere agent of the foreign executor for the purpose of collecting and transmitting the assets, could not possibly make out the schedule of the legacies, as their value can only be ascertained upon the final distribution at the domicile of the decedent.

An analogous point was passed upon by the Supreme Court of Pennsylvania in *Matter of Coleman's Estate*, 159 Pa. St., 21. In that case it was held that where a non-resident testatrix by her will directed all her real estate, including real estate in Pennsylvania, to be sold and the proceeds used to discharge certain legacies, the proceeds of sale of the local lands were not subject to the payment of the inheritance tax above quoted. The opinion of the Court below was adopted by the Supreme Court and is reported in full. The opinion after reviewing *Small's Est.*, 151 Pa. St. 1, *Bittinger's Ap.*, 129 Pa. St., 338, and *Miller vs. Com.*, 111 Pa. St., 321, says :

> "If bonds, notes, stocks, bonds and mortgages be intangible personal property, surely this is. The administration here being ancillary, the legatees have no status. Local debts and expenses having been paid, it is the sole duty of the administrator to transmit the balance to the domicile for administration. The collateral tax is imposed only on what remains for distribution after all the expenses of administration, debts and rightful

claims of third parties, domestic as well as foreign, have been paid or provided for; it is only the net balance that is liable. How, then, is it possible to impose a tax on this fund when it has never been ascertained judicially how much or whether any of it will go to the collateral legatees? Who can tell how much of the fund may be successfully claimed by creditors and others as against the legatees? The court of the domicile is the only tribunal that can determine how much will ultimately go to them (*Orcutt's Appeal*, 97 Pa. St., 179)."

On this point see, also, *Orcutt's Appeal*, *supra*, p. 23, and *Wallace vs. Atty. Gen.*, *supra*, pp. 20, 21.

(h) The authorities cited in behalf of the Government's contention have no bearing upon the question as to the true construction of the act.

The Solicitor-General, at pages 9–13, cites the cases of *Pullman Palace Car Co. vs. Penna.*, 141 U. S., 18, 22, *Adams' Express Co. vs. Ohio*, 166 U. S., 185, 224, 225, and *Bristol vs. Washington Co.*, 177 U. S., 133. All that these cases decide is that a State has power to tax personal property within its limits belonging to non-residents.

We concede that proposition, but it has no bearing whatsoever on the question before the Court. We may however say, in passing, that all of these cases recognize the force of the *mobilia* rule where not expressly repealed by statute.

At pages 14–16 he cites *Dos Passos* and the *Enston* and *Romaine* cases. We shall discuss these cases fully and show that they are strong authorities in support of our contention. The remark in the extract from *Dos Passos*, that "in such cases the theory seems to be that for the purposes of this tax the succession is deemed to take place under the laws of the taxing State," is not borne out by any of the cases cited. It is a mere opinion of the author which is directly

negatived by the opinion of the New York Court of Appeals in the *Romaine* case, which we shall presently discuss.

Third.

The legacy and distributive share do not pass under the testate or intestate laws of New York, and are not subject to the payment of the duty imposed by the act of Congress.

The United States Statute imposes a tax on the passing of legacies or distributive shares "either by will or by the intestate laws of any State or Territory," and the question is, did the legacies and shares in this case pass by will or by the intestate laws of the State of New York where the property was found. This is the controlling question.

There is no question as to the Transfer Tax Law or any other tax law of New York, or any other State. The only question is as to the intestate laws of New York in cases where the deceased is an alien domiciled abroad leaving choses in action in the hands of his agent in New York.

Both sides agree that the securities found here must be distributed according to the laws of Spain; but the plaintiff in error below claims that it is the law of the State of New York that the securities shall be distributed according to the laws of Spain, and that, therefore, within the meaning of the United States Statute, they passed "by the intestate laws" of New York. Defendant in error, on the contrary, claims that by the law of New York the maxim "*mobilia sequuntur personam*" applies, and that by that maxim the securities are conclusively presumed to be in Spain and to pass by her laws, and are not affected by the intestate laws of New York.

With this question the transfer tax acts of New York have nothing to do, as we have already shown.

No one questions the power of New York to tax any person no matter where he is domiciled, and, whether an alien or citizen, in respect to any property or securities found within its borders, or the power of the United States similarly to tax any person in respect to property or securities found within their borders. Whether, however, New York does or does not tax in such case is not the question under the United States legacy tax statute, for under that statute the sole question is whether the securities in this case "passed" under "the *intestate* laws" of New York:

FIRST. The decisions of the Courts of New York have conclusively established that in a case like this the property and securities pass by the foreign law and not by the laws of the State of New York.

In the *Enston* case, 113 N. Y., 181, it is said:

> "It is a general rule of the law that such property attends the owner and has its *situs* at his domicile. It is true that this is a fiction, but it is a fiction *which must prevail* unless there is something in the policy of the statute or its language which shows a different intent."

Here there is a clear recognition that it is the maxim "mobilia, &c." which constitutes the rule—the conclusive presumption that the securities are actually *situated where the owner is domiciled* that controls the Court. Not that it is the intestate law of the State of New York that the securities be distributed according to the law of the domicile, but that it is the law of New York that such securities, though found here, are conclusively presumed to be and legally are, not here, but in the country of the domicile of their owner—in this case in Spain—and that they pass by the law of Spain.

In *Cross vs. U. S. T. Co.*, 131 N. Y., 339, 340, the language is used which we have cited in our original brief, pages 22 and 23.

This is an emphatic case because it held valid the will of a testator domiciled elsewhere, but void by our statutory law on the specific ground that the law of the domicile prevailed not only as to the form of execution of the will, but also as to the validity of its provisions.

See also on this point,

Dammert vs. Osborn, 141 N. Y., 564, 567.

In *Parsons vs. Lyman*, 20 N. Y. 103, at 112, the rule was early stated that :

> " It is an established doctrine, not only of international law, but of the municipal law of this country that personal property has no locality. It is subject to the law which governs the person of the owner * * * as to its transmission by last will and testament and by succession upon the owner dying intestate. * * * The principle no doubt has its foundation in international comity ; but it is equally obligatory *as a rule of decision* in the Courts as a legal rule of purely domestic origin. It does not belong to the Judges to recognize or deny the rights which individuals may claim under it at their pleasure or caprice, but, it having obtained the force of law by user and acquiescence, it belongs only to the political government of the State to change it whenever a change becomes desirable.

Also, that a foreign administrator could give an effective receipt for assets found here, and that for such assets so collected here the foreign administrator was not accountable here when thereafter he took out letters here.

Parsons vs. Lyman has been affirmed in many cases in New York—among the latest being *Matter of Fitch*, 160 N. Y., 92; *Cross vs. U. S. T. Co.*, 131 N. Y., 340.

In *Matter of Prout*, 128 N. Y., 74, it is said:

> "The unquestioned rule of the *common law* that the succession to and the distribution of the estate of an intestate is governed by the law of the domicile makes security there taken on the granting of letters of administration covering the whole personal estate of the intestate an adequate protection to all parties interested." * * *

In *Schluter vs. Bowery Savings Bank*, 117 N. Y., 125–129, it was held that a foreign administrator could give an effective receipt though he had not taken out letters in New York.

The original Collateral Inheritance Act of New York (L. 1885, Ch. 483) provided in Section 1 that after its passage "all property *which shall pass by will or by the intestate laws of this State* from any person who may die seized or possessed of the same while being a resident of the State, or which property shall be within the State," should be subject to a tax, etc.

> "When this statute came before the courts for construction, it was held not to apply to property within the state, either real or personal, that passed by will or intestacy from a non-resident decedent to collateral relatives or strangers, and that it was limited in its effect to property so passing from resident decedents (*Matter of Enston*, 113 N. Y., 174; *Matter of Tulane*, 51 Hun, 213; *Matter of Clark*, 9 N. Y. Supp., 444). In 1887, however, the Legislature amended the act so that it now provides that 'all property which shall pass "'by will *or by the intestate laws of this state* from "'any person who may die seized or possessed of "'the same while a resident of this state, *or if*

" ' *such decedent was not a resident of this state at*
" ' *the time of his death*, which property, or any
" ' part thereof, shall be within this state,' etc.
" (Laws of 1887, Chap. 713, §1)."

This Act of 1887 came before the Court of Appeals in *Matter of Romaine*, 127 N. Y., 80. In that case (from which the above quotation is taken) the question before the Court was whether or not any tax accrued in respect to the property of a non-resident intestate who died in 1888 leaving certain securities consisting of stocks and bonds, mortgages and savings bank deposits to which certain nieces were entitled to succeed under the Laws of Virginia the domicile of the intestate. The Court after referring to the two acts in the language above quoted says at page 84:

" It must be assumed that the legislature in passing the amendment *intended to make some change*, and the expression 'or if such decedent ' was not a resident of this State at the time of ' his death ' suggests what that change was. Before it was amended the act, as was subsequently held, applied only to one class of persons, resident decedents, but by the amendment it is made applicable to another class, non-resident decedents. But does it apply to all persons belonging to these two classes? It is not denied that it applies to all resident decedents and to all non-resident testators, but it is contended that it does not apply to non-resident intestates, because property 'which shall pass * * * ' by the intestate laws of this State ' is expressly mentioned to the implied exclusion of property passing by the intestate laws of other States. This is the position of the appellant. * * * It is difficult, however, to see why the legislature should discriminate simply for purposes of taxation between the property of a non-resident de-

cedent who made a will and of one who did not. * * * Although '*the intestate laws of this state*' are named as a source of title, they are not the exclusive source, *and neither necessarily nor naturally apply to the property of non-resident decedents* named at a later point in the section. In this discussion it is assumed, as the appellant claims, that the personal property of such persons passes according to the laws of the state where they reside. By comparing the original with the amended act and analyzing the provisions of the latter in the light thus afforded, we think that the legislature intended by the forepart of the sentence under consideration to provide *for succession to the estates of residents, to which 'the intestate laws of this state' apply;* that after providing for that class a change is made, indicated by the use of the disjunctive particle, 'or,' which suggests a transition to another subject, and introduces another class, non-residents, who are also provided for, and then each class is carried forward to the taxing clause which embraces both. As thus construed, '*the intestate laws of this state*' *have no application to the second class*, being separated from it by the word 'or' and confined to that clause of the sentence in which they occur. * * * The fiction of law that personal estate has no *situs* away from the person or residence of its owner is done away with *to a limited extent and for a specified purpose*, and the truth is substituted in its stead as a rule of action."

From the above it will be seen that the highest Court of the State of New York has emphatically denied that the property of a non-resident intestate passes "by the intestate laws of the State." When Romaine died the sections of the New York Code of Civil Procedure cited by the Solicitor General were all in force. The Counsel for the State of New

York, among them Mr. Dos Passos, whose work on inheritance taxes is so fully cited and relied on by the Solicitor General, in their briefs emphasized the point that Romaine's property passed by the intestate laws of New York. It was evident that the Legislature intended by the amendment of 1887 to reach the property of non-residents, and the Court of Appeals very properly so construed the Statute as to carry that intention into effect, but if the law were, as is now claimed by the Solicitor General, that the personal property in New York of a non-resident decedent, passed by the intestate laws of New York, the Court of Appeals, in deciding the Romaine case, would undoubtedly have held that the terms of the act were perfectly clear, and that property of non-residents was included, *because it passed by the intestate laws of the State.*

The direct contrary was held. The Court said that if the act meant that only the property of intestates which passed by the intestate laws of New York, was included, then the act did not apply to the property of non-resident intestates, because their property passed by the laws of their domicile. The Court, therefore, in order to effectuate the intent of the Legislature adopted what seemed to be a forced construction, as is pointed out in the dissenting opinion of Judge HAIGHT (p. 90), who says :

> " If we are correct in this interpretation of the statute it follows that the tax in question was improperly imposed, for the reason that the property of the decedent found in this State was personal, and *the situs being with the owner, it would not pass by the intestate laws of this State* (Redfield Surrogate's Court [2d Ed.], 588)."

The highest Court of the State of New York having thus decided that " the intestate laws " of that State do not regulate the distribution of the personal property

of a non-resident intestate found within its borders and that such property does not within the meaning of a State statute *in pari materia* "pass by the intestate laws" of New York, this Court is bound by its universal practice in like cases to adopt the same construction of the phrase "the intestate laws of the State" as used in the act now under consideration. If there is any rule which is conclusively settled it is that the decision of the highest Court of a State as to the interpretation and construction of a State statute will be followed by this Court.

If we look outside of the decisions of the Courts of New York for the basis of the rule or maxim, "*mobilia*," etc., we find everywhere that it is based on the fiction that personal property and securities have their *situs* at the domicile of their owner, and not where they may actually be found.

The doctrine is stated by Chancellor KENT in his Commentaries, Vol. 2d, star paging 429, bottom paging 572, 12th Ed., 1873:

"But it has become a settled principle of international jurisprudence, and one founded on a comprehensive and enlightened *sense of public policy and convenience*, that the disposition, succession to and distribution of personal property, wherever situated, is governed by the law of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the goods happen to be situated." See, also, the following pages and notes:

Story's Conflict of Laws, § 37 and notes, also § 376 to 381.

Lord LOUGHBOROUGH says "It is a clear proposition not only of the law of England but of every country in the world where law has the semblance of a science that personal property has no locality."

"Wherever the domicile of the proprietor is there the property is to be considered as situate" (*Re*

Erwin, 1 Cromp. & Jery. 156 ; Story on Conflict of Laws p. 312, note to § 379).

Thus we find not only the common law of the State of New York and of England, but also the law of the several States of the continent of Europe, agree in the doctrine *mobilia sequuntur personam* and that the law of domicile governs. The rule was most clearly and comprehensively stated by this Court in *Ennis vs. Smith*, 14 How., 400, where it was said :

> "For several hundred years upon the continent, and in England, from reported cases, for a hundred years, the rule has been that personal property, in cases of intestacy, is to be distributed by the law of the domicile of the intestate at the time of his death. It has been universal for so long a time that it may now be said to be a part of the *jus gentium*. Lord THURLOW speaks of it as such in the House of Lords in the case of *Bruce vs. Bruce*. ERSKINE, in his Institutes of the Law of Scotland (B 3, tit. 9, § 4, 644), says this rule is founded on the laws of nations. * * *
>
> "The rule prevails also in the ascertainment of the person who is entitled to take as heir or distributee. It decides whether primogeniture gives a right of preference, or an exclusive right to take the succession, whether a person is legitimate or not to take the succession, whether the person shall take *per stirpes* or *per capita*, and the nature and extent of the right of representation (Story's Conflict of Laws)."

See, also, *Dicey on Conflict of Laws*, 683, 684; *1 Williams on Executors*, 300, 310; *Story Conflict of Laws*, § 473 ; *Wharton Conflict of Laws*, 576. *2 Williams on Executors*, 1387.

Plaintiff in error, however, claims that it is the State law which prescribes that the rule of domicile shall prevail, and that, therefore, the property

passes by our law, and he refers to the New York statute—New York Code of Civil Procedure, § 2694 *et seq.*

That section provides in substance that the validity and effect of a will and the descent of real estate in the State "are regulated by the laws of the State without regard to the residence of the decedent," and that, "except where special provision is otherwise made by law," the validity and effect of a will, and the distribution of property other than real estate situated within the State, "are regulated by the laws of the State or country of which the decedent was a resident at the time of his death."

The statute does not enact that such property shall be distributed according to the laws of the decedent's domicile, but *declares* that such wills and property "*are regulated by the laws* of the state or country of which the decedent was a resident at the time of his death."

The statute, as we have seen, made no change in the existing law. It declared the common law of the State well settled, at least, since Parsons vs. Lyman, decided in 1859.

Ruckgaber vs. Moore, 107 Fed., 947.

The law as so declared is, and always has been, the law of England.

In *Thomson vs. Advocate-General*, and in every subsequent case, had it been held that it was the law of England, pursuant to which the property passed, the decisions must have been different, because in every case the decision was put directly upon the ground that the devolution of the property was by the law of the domicile.

In *Thomson vs. Advocate-General* (12 Clark & Finelly, 21), the Chancellor says: "I apprehend * * * that personal property in England follows the law of the domicile, and that it *is precisely the same* as if the *personal property had been in India at the time of the testator's death;*" and (p 22) "it must be

considered as property within the domicile of the testator, which domicile was Demarara."

Lord BROUGHAM said (p. 26), "but the personal property is in contemplation of the law whatever may be the fact, supposed to be within the domicile of the testator or intestate."

Lord CAMPBELL says (p. 29), although the property is in England at the time of his death, "in contemplation of law that property is supposed to be situated where he was domiciled, and, therefore, does not come within the act."

In *Wallace vs. Attorney-General* (L. R., 1 Ch. Appeals, p. 7) Lord CRANWORTH said that, to be within the section, he must be a person who becomes entitled by virtue of the laws of this country, and it was held, because domiciled abroad, he did not become so entitled.

On page 8 he says "the only safe way * * * is to consider the duty as imposed only on those who claim title by virtue of our law," and on page 9, "some limitation must be implied, and that limitation can only be a limitation confining the operation of the words to persons who become entitled *by virtue of the laws of this country.*"

Plainly enough, had the Court in these and similar cases regarded the law of England as prescribing the rule and giving the title because it was the law of England that the case was governed by the law of the domicile, the decision in those cases would have been the reverse.

Again we ask, in the light of these cases, can it be supposed that Congress, in enacting the law of 1898, did not intend to adopt the judicial construction of the legacy tax adopted from England, as well as the United States Act of 1864?

It remains only to refer again to the cases cited by the plaintiff in error respecting the maxim "*mobilia*," etc.

Counsel for plaintiff in error cites a number of cases to the effect that the maxim "*mobilia*,"

etc., has recently been greatly restricted. It will be found on examination that all those cases refer to a statutory restriction of the maxim, and, so far as this Court is concerned, they are all to the effect that there is nothing in the Constitution or laws of the United States to prevent the several States restricting the effect of that maxim to any extent that they desire. No one disputes that law. No one claims that the United States might not, if Congress had chosen, have provided that all property within the United States, although belonging to a person domiciled elsewhere, should be taxed. On the other hand, we submit that there is no case or dictum or suggestion anywhere to be found to the effect that, in the absence of direct and special provision by the legislative power, the maxim "*mobilia*," etc., does not prevail; and not only that, but that it prevails on the fiction conclusively presumed by the courts that the *situs* of the property is actually that of the domicile of the deceased.

The case of *Bristol vs. Washington County*, 177 U. S., 133, is a good illustration. There the State authorities had held that the State Statute was broad enough to include choses in action actually situated in the State and kept there for business purposes, but belonging to one domiciled out of the State. The United States Circuit Court accepted the ruling of the State authorities as to the State Statute on that subject, and held that there was nothing in the Constitution or laws of the United States in conflict with such ruling. There the Statute of Minnesota, as construed by her own administrative officers and by her Supreme Court, had provided that the maxim "*mobilia*," etc., should have a limited effect in the State of Minnesota, and that construction of the State statute by the highest Court of the State was followed by this Court.

All the United States decisions hold is that such special revocation or any revocation, or the absolute revocation, of the maxim by any state is within its

powers, and not in conflict with the Constitution or laws of the United States.

Story in his Conflict of Laws, Chancellor Kent in his Commentaries, and various Judges in England who have passed upon it, and all the cases in the United States which have considered it, unite in appreciation of its vast utility, of its tendency properly and satisfactorily to solve international questions, and it is worthy of remark that the first leading case on the subject, that of Bruce vs. Bruce in England, referred to in the opinion in the Thomson case, was that of an American citizen whose property in England was held not to be liable to the legacy tax because of the doctrine expressed in the maxin "*mobilia sequntur personam.*"

We submit, therefore, that by an unbroken line of decisions—we say unbroken, as the one or two cases to the contrary are hardly worth consideration—the doctrine of the maxim "*mobilia,*" etc., has been thoroughly established with reference to legacy tax statutes, and that it has always been upon the theory that the property, whether actual goods or securities, is in contemplation of law situated at the place of the domicile of the owner, and that in the absence of any express statute of the sovereignty where the goods are actually situated that maxim will prevail, and the Court must hold that the property actually is, for the purposes of this act where the domicile of the owner is, and the fact that the maxim may have been partially revoked or qualified in other matters and for other purposes has no bearing upon the question presented by this case.

We therefore submit that both the questions certified by the Court below should be answered in the negative.

November, 1901.

JOHN G. CARLISLE,
WHEELER H. PECKHAM,
WILLIAM EDMOND CURTIS,
HENRY M. WARD,
Of Counsel for Defendant in Error Below.

Supreme Court of the United States.

No. 287.—October Term, 1901.

Ferdinand Eidman, Collector, &c., vs. Miguel R. Martinez, Administrator, &c. } Upon certificate from the Circuit Court of Appeals for the Second Circuit.

[March 17, 1902.]

This case came up upon certain questions of law arising in an action brought in the Circuit Court for the Southern District of New York by Martinez, as ancillary administrator with the will annexed of the estate of Salvador Elizalde, against the Collector of Internal Revenue, for the refund of an inheritance tax paid to the defendant upon certain personal property in the city of New York.

The facts out of which the questions arose are as follows:

Salvador Elizalde, a non-resident alien, a subject of the King of Spain, who had never resided within the United States, died in Paris, France, on April 27, 1899, leaving a will in the Spanish language, executed in Paris, in the year 1891, pursuant to the laws of Spain. This will was filed and protocolized in the office of the Spanish consul in Paris, and thereby under the laws of Spain and the consular convention or treaty between Spain and France, Arturo Elizalde, the sole legatee under said will, became entitled to the possession and administration of all the personal property of the decedent. Said Arturo Elizalde is the only son and sole next of kin of the decedent, and is a non-resident alien and a Spanish subject. He has resided all his life in Spain and France, and has never resided in the United States. Said will purports to give all of the personal property of the decedent to his said son, but, by the laws of Spain, only one-third of the property passed by the will, and the remaining two-thirds passed to said son by and under the Spanish intestate law.

The decedent left certain Federal, municipal and corporate bonds, of the par value of $225,400, in the custody of his agents in the city of New York, and they were within the third collection district of New York at the date of his death.

After the filing of said will in Paris, Arturo Elizalde entered upon the administration of the decedent's personal estate, and appointed the defendant in error, Miguel R. Martinez, his attorney for the purpose of receiving ancillary letters of administration with the will annexed in the State of

New York, and such letters were issued to him by the surrogate of New York County. After receiving such letters, said Martinez took possession of said bonds.

The United States Commissioner of Internal Revenue, under the alleged authority of the twenty-ninth and thirtieth sections of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," assessed an internal revenue tax of $4,293.76 upon a legacy and distributive share arising from personal property in the hands of the administrator, defendant in error, who paid said tax to the United States collector of internal revenue for the third district of New York, plaintiff in error, under protest and upon compulsion of the collector's threat of distraint and sale, and made the statutory application for its refund to the Commissioner of Internal Revenue, who rejected the application. The administrator then brought this action in the Circuit Court of the United States for the Southern District of New York against the collector to recover the amount of the tax.

The collector demurred; the demurrer was overruled, and a final judgment entered against the collector for the amount claimed, with interest and costs. The collector then brought the action into the Circuit Court of Appeals, which certified to this court the following questions of law arising out of the foregoing facts:

"1. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon the passing of any legacy arising out of the personal property of a non-resident alien who has never resided or had a domicile within the United States, and who dies without the United States in the year 1899, leaving a will made and executed at his foreign domicile, pursuant to the laws thereof, by which he gives all his property to a non-resident alien legatee, and who leaves certain personal property within the State of New York exceeding $10,000 in value?"

"2. Is any tax or duty imposed by the twenty-ninth and thirtieth sections of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," upon the passing of any distributive share arising out of the personal property of a non-resident alien who has never resided or had a domicile within the United States, and who dies without the United States, in the year 1899, intestate, and by the law of his foreign domicile all of his personal property passes to his son, also a non-resident alien, and who leaves certain personal property within the State of New York, exceeding $10,000 in value?"

Mr. Justice Brown delivered the opinion of the Court.

This case raises the question whether the inheritance tax law of the United States applied, in 1899, to the intangible personal property of a non-resident alien, who never had a domicile in the United States and died abroad—such personal property being within the United States and having

passed to his son, also an alien domiciled abroad, as sole legatee and next of kin of the deceased, partly under a will executed abroad and partly under the intestate laws of Spain.

By the twenty-ninth section of the war tax law of June 30, 1898, (30 Stat. 448, 464,) "Any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property . . . passing . . . from any person possessed of such property, either *by will or by the intestate laws of any State or territory*, . . . shall be, and hereby are, made subject to a duty or tax," &c.

The ancient maxim of the law, *mobilia sequuntur personam*, was the outgrowth of conditions which have largely ceased to exist, and of an age when personal property consisted principally of articles appertaining, as the name indicates, to the person of the owner, such as gold and silver, jewels, apparel, and less immediately to horses, cattle and other animals, and to the products of the farm and the shop. As this property was, in primitive times, usually kept under the personal supervision of the owner, and was often carried about by him on his journeys, (as it often still is in Oriental countries,) the principle became incorporated in the law that its locality was determined by the domicile of the owner, and that his rights with respect to such property were fixed by the law of that domicile.

While the enormous increase in the amount and variety of personal property during the past century has necessitated certain limitations of the maxim, particularly in matters of taxation, it is by no means obsolete. It is still the law that personal property is sold, transmitted, bequeathed by will, and is descendible by inheritance according to the law of the domicile and not by that of its *situs*. (*Cross* v. *United States Telegraph Co.*, 131 N. Y. 330; *Ennis* v. *Smith*, 14 How. 424; *Dammert* v. *Osborn*, 141 N. Y. 564.) In matters of taxation, however, and of subjecting the personal property of non-residents to the claims of local creditors of the owner, serious encroachments have been made upon the ancient maxim, and a rule has grown up in modern times that legislatures may deal with the personal as well as with the real property of non-residents within their jurisdiction; and that such property, while enjoying the protection and benefits of the local law, may be taxed for the expenses of the local government. These doctrines have found expression in a large number of cases in this court. (*Green* v. *Van Buskirk*, 5 Wall. 307; *S. C.*, 7 Wall. 139; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Walworth* v. *Harris*, 129 U. S. 355; *Security Trust Company* v. *Dodd*, 173 U. S. 624, and cases there cited.)

Recent cases in this court have affirmed very broadly the right of the legislature to tax the local property of non-residents, and particularly of corporations who are permitted by comity to do business within the State.

(*The Delaware R. R. Tax*, 18 Wall. 206; *Erie R. R. Co.* v. *Pennsylvania*, 21 Wall. 492; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Marye* v. *Baltimore & Ohio R. R.*, 127 U. S. 117; *Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Adams Express Co.* v. *Ohio*, 166 U. S. 185.) The same principle has been applied not only to tangible property but to credits and effects. (*Tappan* v. *Merchants' National Bank*, 19 Wall. 490; *Savings Society* v. *Multonomah County*, 169 U. S. 421; *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133.)

The question in each case is not of the power of the legislature to tax the personal property of non-residents, both tangible and intangible, since that is well established both in England and America, (*Mager* v. *Grima*, 8 How. 498,) but of its intent to do so by the particular act in question. The inheritance tax law of the United States above cited applies to property "passing by will or by the intestate laws of any State or territory." As the property in this case did not pass under any will executed in any State or territory of the United States, or by the intestate laws of any such State or territory, the case is not within the literalism of the act, unless we are to use the word "State" in a sense broad enough to include a foreign State or territory. As matter of fact, the decedent was a Spanish subject, who had never resided in the United States, had executed a will at Paris in the Spanish language, pursuant to the laws of Spain, under which will one-third of his property passed to his son and two-thirds to the same person under the intestate laws of Spain. The property left by the will consisted of Federal, municipal and corporation bonds, in custody of the agents of the deceased in New York. It is the locality of the property within the jurisdiction of the United States which subjects it, if at all, to the legacy or succession tax.

It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of *exception* confining the operation of duty, (*Warrington* v. *Furbor*, 8 East. 242, 247; *Williams* v. *Sangar*, 10 East. 66, 69; *Denn* v. *Diamond*, 4 B. & C. 243, 245; *Tomkins* v. *Ashby*, 6 B. & C. 541; *Doe* v. *Snaith*, 8 Bing. 146, 152; *Wroughton* v. *Turtle*, 11 M. & W. 561, 567; *Gurr* v. *Scudds*, 11 Exchq. 190,) though the rule regarding *exemptions* from general laws imposing taxes may be different. (Cooley on Taxation, 146; *In Matter of Enston*, 113 N. Y. 174, 177.)

We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language. (*Hartranft* v. *Wiegman*, 121 U. S. 609; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468;

United States v. *Wigglesworth*, 2 Story, 369; *Powers* v. *Barney*, 5 Blatch. 202.)

It is pertinent in this connection to examine similar statutes passed in other countries and in the several States of this Union, and to inquire what construction is given to them. By the English tax legacy act of 1796 a tax was imposed on every legacy "given by any will or testamentary instrument to any person who shall die after the passing of this act." In *Attorney General* v. *Cockerell*, 1 Price, 165, (1814) this was held by the Court of Exchequer to apply to a legacy bequeathed by a British subject residing in the East Indies to persons living in England, if the executor proved the will in England, and paid the legacy there, though the testator held his property in India, and resided and made his will and died there. The case was put upon the ground that the will was proved in England, that the executors had received the property there, and that the legatees resided there and were to be paid there. But the case is further distinguishable from the one under consideration in the fact that the testator was a British subject and domiciled in a British possession, although the stress of the case was laid upon the residence of the legatees in England. *The Attorney General* v. *Beatson*, 7 Price, 560, (1819) differs from the last one only in the fact that the property bequeathed was in India, and was remitted to England and paid to legatees residing in Scotland. But it was held in the *Estate of Ewin*, 1 Cr. & Jer. 151, (1830) that foreign stocks, the property of a testator domiciled in England, were liable to the legacy duty, although the stocks were transferable and the dividends were payable in the foreign countries. In this case the law of the domicile was held to be controlling and the domicile to be the *situs* of the personal property. The two cases from Price were not cited.

In *Jackson* v. *Forbes*, (2 Cr. & Jer. 382,) a testator born in Scotland, who resided and died in India, leaving property there but none in England, left his property to his four natural children. The property was collected by his executors, sent to England and invested in their own names. The court held the property exempt from legacy duties, apparently upon the ground that the property was administered by the executors without necessarily invoking the aid of the Court of Chancery, although no reasons were given in the opinion. Up to this time it had been thought that, if the legacy were paid from assets administered in England, the duty was payable. The two cases from Price were cited but not discussed. This case was subsequently affirmed by the House of Lords under the name of *The Attorney General* v. *Jackson*, (8 Bligh, [N. S.] 15.) The case of *Logan* v. *Fairlie*, (1 Mylne & Craig, 59,) was a similar case, and the legacy was held to be exempt upon its authority.

But in *Arnold* v. *Arnold*, (2 Mylne & Craig, 256,) a similar case of a testator residing and dying in India, leaving property there which was re-

mitted to England and administered there, the legacy tax was held not to be payable, and the question was regarded as finally settled by *Attorney General* v. *Jackson.* The two cases from Price were overruled.

Finally, in *Thompson* v. *Advocate General,* (12 Cl. & Fin. 1,) a British born subject died, domiciled in a British colony. At the time of his death he was possessed of personal property in Scotland. Probate of his will was taken out in Scotland for the purpose of administering that property, and legacies were paid to legatees residing there. It was held by the House of Lords that no legacy duty was payable. The two cases from Price were flatly overruled, the other cases cited and discussed at length, and the doctrine of domicile applied. This case must be regarded as settling the law of England upon the subject.

It will be observed in these cases that the testator was a British subject, but in the *Case of Bruce,* (2 Cr. & Jer. 436,) the testator was an American who lived and died abroad, having appointed an English executor and bequeathed property in England to legatees residing there. The case is exactly in point, and the court had no difficulty in reaching the conclusion that the property was not liable to legacy duty.

There are some later cases in England, but none that seem to qualify the rule laid down in *Thompson* v. *The Advocate General.* In some of them a distinction is drawn between the legacy tax act and the succession duty act, which came into operation May 19, 1853, and in *In re Lovelace,* (4 De Gex & Jones, 340,) it was said that the latter act applied to a succession *inter vivos* under a British settlement to British property vested in British trustees, and falling under the jurisdiction of a British court, although the persons entitled were aliens domiciled abroad. This case arose under an English marriage settlement made in England on the marriage of two English subjects, and affected English personalty only. In *Wallop's Trust,* (1 De Gex, Jones & Smith, 656,) a distinction was drawn between the legacy act of George III and the succession duty act, and a broader construction given to the latter. In *Wallace* v. *Attorney General,* (L. R. 1 Ch. Apps. 1,) it was held that a succession duty was not payable on legacies given by the will of a person domiciled in a foreign country. The law was treated as settled by *Thompson* v. *The Advocate General,* (12 Cl. & F. 1,) and the question discussed on principle in a vigorous opinion. The converse of this case is that of *Attorney General* v. *Napier,* (6 Exch. 217,) in which a British born subject died in India, though he had never acquired a domicile there, and it was held that the whole of his property, though chiefly situate abroad, was liable to a legacy duty. This case is similar to that of *Ewin,* (1 Cr. & Jer. 151,) above cited, though decided twenty years later. See also *Attorney General* v. *Campbell,* (L. R. 5 Eng. & Irish Apps. 524;) *Lyall* v. *Lyall,* (L. R. 15 Eq. 1.)

From this analysis of the English cases it clearly appears that, under a general act imposing a duty upon legacies, the law of the domicile of the testator controls, and if he be domiciled abroad, whether an alien or a British subject, his legacies are exempt, whether the property be in England at the time of his death, or be subsequently remitted there by his executors for local administration and distribution.

We proceed now to an examination of the State decisions upon the same subject, which, with one or two exceptions, tend in the same direction. The Massachusetts collateral inheritance law of 1891 imposes a tax upon "all property *within the jurisdiction of the Commonwealth*, . . . *whether belonging to inhabitants of the Commonwealth or not*, and whether tangible or intangible, which shall pass by will or by the intestate laws of the Commonwealth regulating intestate succession," &c. In *Callahan* v. *Woodbridge*, (171 Mass. 595,) it was held that under this act the succession to property of non-residents was expressly taxed as if the property belonged to inhabitants of the Commonwealth, and that the language, "which shall pass by will or by the laws of the Commonwealth regulating intestate succession," taken in connection with the clauses immediately preceding it, applies to foreign wills, and to property that passes under the statute of this Commonwealth which regulates the succession to the property of a non-resident owner after his death." The testator in that case lived in the State of New York, but the property was within the jurisdiction of Massachusetts. The statute was held to apply to property tangible or intangible. We make no criticism of this case, which was placed expressly upon the language of the statute.

The inheritance tax of New York of 1885 imposed a tax upon "all property which shall pass by will or by the intestate laws of the State, from any person who may die seized or possessed of the same while being a resident of the State, or which property shall be within this State, or any part of such property . . . transferred by deed, grant, sale or gift made or intended to take effect . . . after the death of the grantor," &c. In the *Matter of Enston*, (113 N. Y. 174,) this was held not to apply to property within the State which passed by will or intestacy from a non-resident decedent to collateral relatives or strangers, legatees domiciled in the State, and the latter clause, "or which property shall be within the State," was held to be limited to such as was transferred by deed, grant, sale or gift *inter vivos*. The act was amended in 1887 so as to include "all property which shall pass by will or by the intestate laws of this State, from any person who may die seized or possessed of the same while a resident of this State, or *if such decedent were not a resident of this State at the time of his death*, which property or any part thereof shall be within this State." And in *Romaine's case*, (127 N. Y. 80,) it was held to apply to personal property in New York, owned by a non-resident intestate at

the time of his death, which was habitually kept or invested by him there. There can be but little doubt of the propriety of this ruling. In *Whiting's case*, (150 N. Y. 27,) the same rule was extended to bonds of foreign as well as domestic corporations, and certificates of stock of domestic corporations, (but not of foreign,) owned by a non-resident decedent, but deposited by him in a safe deposit vault in New York. See also *Bronson's case*, (150 N. Y. 1,) and *Houdayer's case*, (150 N. Y. 37.) These cases seem rather to accentuate the general principle that general statutes imposing taxes upon legacies do not apply to the personal property of non-resident testators, and that a special inclusion of such is necessary to subject it to taxation.

The inheritance tax law of Maryland subjects to taxation all property "passing from any person who may die seized or possessed thereof, *being in this State;*" and it was held in *State* v. *Dalrymple*, (70 Md. 294,) that the words "being in this State" referred, not to the decedent himself, but to his property. The testator was a resident of California, and his property was also bequeathed to residents of the same State. The property which was in Maryland consisted of an undivided quarter of the personal estate of the brother of the testator who died in Maryland. The act was held to apply, though the testator's domicile was in California. The English cases were cited and held to be distinguishable by reason of the peculiar language of the Maryland act. The language was evidently ambiguous, but the court having held that the words "being in this State" applied to the property and not to the person, of course its liability followed. A like construction was given to the same words in *Commonwealth* v. *Smith*, (5 Penn. St. 142;) *In re Short's Estate*, (16 Penn. St. 63.) The case of *Billings* v. *The People*, (189 Ill. 472,) is of no value, as the testator as well as his legatees were domiciled in Illinois, and the question was as to the liability of the widow's dower.

The case of *Alvany* v. *Powell*, (2 Jones Eq. 51,) is directly in point, and undoubtedly sustains the positions of the government in this case. The North Carolina inheritance act imposed a tax upon "all personal property or goods bequeathed to strangers or collateral kindred, or which shall be distributed to, or amongst the next of kin, of any intestate, when such next of kin are collateral relations of such intestate." The act was held to apply to property in North Carolina descending to a brother from an intestate domiciled in Canada. The court was satisfied that the true principle, both in regard to real and personal property, was the *situs* of the property. The English case of *Thomson* v. *The Advocate General*, (12 Cl. & F. 1,) decided by the House of Lords, was considered at length, and thus criticized: "No one can read the opinion delivered before the Lords in the case of *Thompson* v. *The Lord Advocate*, which is the case in which the principle of the domicile is finally settled, without being struck by the

fact that there is throughout a marked paucity of reasoning." The North Carolina case was decided in 1854, and, so far as we know, has not been followed in any other State, and it is the only one to which our attention has been called that seems to be in point in favor of the construction contended for by the government.

There are a number of other cases in the State courts, but they either involve questions of taxation under general laws imposing taxes upon real and personal property, not being special inheritance taxes, or the language of the particular statute is such as to create little doubt as to the intention of the legislature to tax or not to tax the particular inheritance in question. (*Small's Estate*, 151 Penn. St. 1; *Weaver's Estate* v. *State*, 81 N. W. Rep. 603; *State* v. *St. Louis Co. Court*, 47 Mo. 594; *Catlin* v. *Hall*, 21 Vt. 152; *People* v. *Home Ins. Co.*, 29 Cal. 533; *Hoyt* v. *Commissioners*, 23 N. Y. 224; *People* v. *Gardner*, 51 Barb. 352.) In some jurisdictions a distinction has been made between tangible and intangible property which does not arise in this case. (*Orcutt's Appeal*, 97 Penn. St. 179.)

The tax in question in this case not being upon the property itself, but upon the succession, (*United States* v. *Perkins*, 163 U. S. 625; *Magoun* v. *Illinois Trust & Savings Co.*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 41.) laws imposing general taxes upon real and personal property are not controlling when applied to taxes upon the succession, when such succession takes place and is governed by the laws of a foreign country. The actual *situs* of the property in such cases cuts but a small figure, while in the case of general taxes upon such property it is now considered determinative of the whole question.

The question involved in this case, however, arose under the act of June 30, 1864, before Mr. Justice Gray of this court, while holding the Circuit Court for Massachusetts, in *United States* v. *Hunnewell*, (13 Fed. Rep. 617.) Section 124 of that act imposed a duty on legacies or distributive shares arising from personal property passing from any person possessed of such property, either by will, or by the intestate laws of any State or territory. The action was brought to recover the tax upon American securities bequeathed by a French citizen domiciled in France to a son, who was also domiciled there. The will was executed in conformity with the French law and was duly proved there, though a local executor was appointed by the probate court in Boston to transfer to the legatee the securities in question. It was held that section 124 did not make the duty payable when the person possessed of such property died testate if it would not be payable if such person died intestate; and as if the deceased had died intestate her son would not have taken a distributive share by the intestate laws of any State or territory, his rights were the same if he took by will. In other words, that the words "either by will or by the intestate laws of any State or territory" must be construed together, and

would apply only to wills executed within any State or territory of the United States. The case is precisely in point.

We regard this case as a correct exposition of the law. It is not necessary to rely exclusively upon the English cases, or upon those in the State courts, which hold that a general law imposing an inheritance tax upon property passing by will or descent does not apply to intangible personal property within the jurisdiction of the taxing power, but owned by persons domiciled abroad, under the laws of which domicile the property passes, since the statute in question here applies only to property passing "either by will or by the intestate laws of any State or territory." Now, as the finding in this case is that the property passed partly under a Spanish will and partly under the intestate laws of Spain, the only question is whether the words "passing by will" are limited by the subsequent words "or the intestate laws of any State or territory." We are clearly of opinion that they are, and that the words "passing by will" are limited to wills executed in "any State or territory" under whose laws the property would pass, if the owner had died intestate. The whole scheme of the act evidently contemplates the application of the tax only to the property of a person domiciled in a State or territory of the United States whose property is transmitted under our laws. This is evident not only from the language of section 29, above quoted, but from the provision of section 30, "that every executor, &c., . . . shall pay to the collector or deputy collector of the district *of which the deceased person was a resident* the amount of the duty or tax assessed upon such legacy or distributive share," &c. It would be difficult to find language more expressive of an intent to confine the tax to persons domiciled in this country. It need only be added that while the words "State or territory" are used in treaties, and perhaps also in some acts of Congress regulating our international relations as including foreign States, they are used in the Constitution and in ordinary acts of Congress as applying only to States or territories of the United States.

If, as in several of the States, the words "passing by will or by the intestate laws of this State," or similar words, are connected with words declaring that the tax was intended to be imposed upon the estates of persons domiciled abroad, the latter provision is held to apply, and the words "passing by will or the intestate laws of this State" are held to include the estates of persons domiciled abroad. Such is the case in Illinois: (*Billings* v. *People of Illinois*, 189 Ill. 472;) Massachusetts: (*Callahan* v. *Woodbridge*, 171 Mass. 595; *Greves* v. *Shaw*, 173 Mass. 205;) Maine: (*State* v. *Hamlin*, 86 Me. 495;) Ohio: Laws of 1894, p. 166; Connecticut: Laws of 1889, p. 106; Tennessee: (*State* v. *Alston*, 95 Tenn. 674.) But it is hardly necessary to say that the construction given to these statutes would have no application to cases where words expressly providing for the estates of non-residents are omitted.

To say that we recognize by comity the law of a foreign domicile as controlling the transmission or succession of personal property because it thereby becomes *our* law, (and the property therefore taxable,) as is indicated in some cases, notably in *Albany* v. *Powell*, (2 Jones Eq. 51,) is misleading and little more than a play upon words. When we speak of *our* laws we mean to be understood as referring to our own statutory laws or the common law we inherited from the mother country, and when we apply the laws of a foreign domicile we do so, not because they are our laws, but because upon principles of comity we recognize those laws as applicable to the particular case. But to speak of such foreign laws as thereby becoming "the intestate laws of any State or territory," wherein they are enforced, is practically to confound the whole distinction between the law of the *situs* and the law of the domicile. We do not enforce the law of Spain in this case because it is our law, but because the practice of all civilized nations is to recognize the law of the domicile as governing the transmission and inheritance of personal property, and to prevent the confusion that would follow, if estates, situated possibly in half a dozen countries, were administered and distributed according to the laws of each country in which any portion of such estate happened to be located. We decline to hold the tax involved in this case applicable to this estate because the words of the statute do not require it, and because the thing taxed, that is, the transmission of the property to the legatees or next of kin, takes place in a foreign country. It is true that Congress may, and in certain cases has seen fit to, adopt the laws of a particular State, and apply them within a territory, as was done when Congress applied the laws of Oregon to Alaska, (23 Stat. 257,) and certain statutes of Nebraska to Oklahoma, (26 Stat. 87.) They thereby became the laws of those territories as much as if enacted by a territorial legislature, and were universally applicable. But that result follows expressly from the statute, and not from the recognition of the foreign law as applicable to a particular case. Section 2694 of the New York Code recognizes this distinction, in its requirement that "except where special provision is otherwise made by law, the validity and effect of the testamentary disposition of any other" (than real) "property situated within the State, and the ownership and disposition of such property where it is not disposed of by will, are regulated by the laws of the State or country of which decedent was a resident at the time of his death."

Conceding it to be within the power of Congress to impose an inheritance tax upon property in this country, no matter where owned or transmitted, it has not done so in this case, and the questions propounded by the Court of Appeals must be answered in the negative.

Mr. Justice WHITE and Mr. Justice MCKENNA concurred in the result.